UNIVERSITY OF CALIFORNIA LOS ANGELES

SCHOOL OF LAW
LIBRARY

THE LIBRARY OF THE UNIVERSITY OF CALIFORNIA LOS ANGELES

Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

http://www.archive.org/details/caseslawequityny24newyiala

New York (State) Reports. Supreme Court.

REPORTS

OF

Cases in Law and Equity

DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF NEW YORK.

BY OLIVER L. BARBOUR.
Counsellor at Law.

VOL. XXIV.

NEW YORK:
BANKS & BROTHERS, LAW PUBLISHERS,
No. 144 NASSAU STREET.
ALBANY: 475 BROADWAY
1863.

Fac Lib
KFN
5049
.S9 B3
v.24

FL
S
New Y 71
B2342
1848
v.24

Entered according to act of Congress in the year one thousand eight hundred and forty-eight,
By GOULD, BANKS & CO.
in the clerk's office of the district court of the northern district of New York.

JUSTICES OF THE SUPREME COURT,

DURING THE YEAR 1857.

FIRST JUDICIAL DISTRICT.

CLASS 1 WILLIAM MITCHELL.*
" 2. JAMES J. ROOSEVELT.
" " HENRY E. DAVIES.
" 3. THOMAS W. CLERKE.
" 4. CHARLES A. PEABODY.

SECOND JUDICIAL DISTRICT.

" 1. JOHN W. BROWN.†
" 2. SELAH B. STRONG.*
" 3 LUCIEN BIRDSEYE.
" 4. JAMES EMOTT.

THIRD JUDICIAL DISTRICT.

" 1. MALBONE WATSON.‡
" " DEODATUS WRIGHT.§
" 2. WILLIAM B. WRIGHT.*
" 3. IRA HARRIS.
" 4. GEORGE GOULD.

FOURTH JUDICIAL DISTRICT.

" 1. CORNELIUS L. ALLEN.*
" 4. AMAZIAH B. JAMES.
" 3. ENOCH H. ROSEKRANS.
" 4. ALONZO C. PAIGE.†

FIFTH JUDICIAL DISTRICT.

Class 1. FREDERICK W. HUBBARD.*
" 2. DANIEL PRATT.
" 3. WILLIAM J. BACON.
" 4. WILLIAM F. ALLEN.

SIXTH JUDICIAL DISTRICT.

1. WILLIAM H. SHANKLAND.†
" 2. HIRAM GRAY.*
" 3. CHARLES MASON.
" 4. RANSOM BALCOM.

SEVENTH JUDICIAL DISTRICT.

" 1. THOMAS A. JOHNSON.*
" 2. THERON R. STRONG.
" 3. HENRY WELLES.
" 4. ERASMUS DARWIN SMITH.

EIGHTH JUDICIAL DISTRICT.

" 1. LEVI F. BOWEN.†
" 2. JAMES MULLETT.*
" 3. BENJAMIN F. GREENE.
" 4. RICHARD P. MARVIN.

* Presiding Justice.

† Sitting in the Court of Appeals.

‡ Died April, 1857.

§ Appointed by the Governor, to fill the vacancy caused by the death of Judge WATSON.

CASES

REPORTED IN THIS VOLUME.

A

Adams, Gasper v. 287
American Linen Thread Co., De Groff v. 375
Ash v. Coleman, ... 645

B

Bacon, Winfield v. 154
Bank of Washington, Disosway v. 60
Bangs v. Scidmore, ... 29
Barger, Travis v. 614
Barr, Powers v. 142
Barney, Sweet v. 533
Barnum, Munn v. 283
Beale v. Parish, ... 243
Benson v. The Mayor &c. of Albany, ... 248
Berger, Samuel v. 163
Berry v. Yates, ... 199
Blackwell v. Wiswall, ... 355
Bleakley, Deyo v. 9
Board of Supervisors of New York, The Colonial Life Assurance Society v. 166
Bonesteel, Van Rensselaer, v. 365
Bowman v. Eaton, ... 528
Bradley, Sweet v. 549
Brinckerhoff v. Phelps, ... 100
Brown v. Smith, ... 419
——— v. Torrey, ... 583
Budlong v. Van Nostrand, ... 25
Burnside v. Whitney, ... 632
Burr, House v. 525
Burt v. Farrar, ... 518
Bush v. Hibbard, ... 292

C

Chadwick, Van Rensselaer v. 333
Chandler v. Northrop, ... 129
Chase v. The New York Central Rail Road Co., ... 273
Clark v. Clark, ... 581
Clarke v. The City of Rochester, 446
Clinton v. Rowland, ... 634
Coleman, Ash v. 645
———, The Second Avenue Rail Road Co. v. 300
Colonial Life Assurance Society v. Supervisors of New York, ... 166
Comstock, Smart v. 411
Conant v. Van Schaick, ... 87
Conover v. Devlin, ... 587, 636
Courter, Grant v. 232
Cowles v. Gridley, ... 301
Crouse, Smith v. 433
Culver, Killmore v. 656

D

Dana, Jones v. 395
De Groff v. The American Linen Thread Co., ... 375
Delaware and Hudson Canal Co., Selden v. 362

Deuel v. Rust,..... 438
Devlin, Conover v.....587, 636
Deyo v. Bleakley,..... 9
Disosway v. The Bank of Washington, ... 60
Dorlon, Fowler v..... 384
Draper, The People ex rel. Wood v. 265
———, Wood v..... 187
Dwight v. Peart,..... 55

E

Eaton, Bowman v. 528
Exchange Bank v. Monteath,.... 371

F

Farrar, Burt v. 518
Farrington v. The Frankfort Bank, 554
Filkins v. Whyland,..... 379
Finch, Pier v. 514
Finger, The People ex rel. Kipp v. 341
Forsyth, Wilson v. 104
Fowler v. Dorlon, ... 384
———, Griswold v. 135
Foy v. The Troy and Boston Rail Road Co.,..... 382
Frankfort Bank, Farrington v.... 554

G

Gasper v. Adams, ... 287
Gifford, Van Rensselaer v..... 349
Gleason v. Thayer, ... 82
Grant v. Courter, ... 232
Gridley, Cowles v..... 301
Griswold v. Fowler,..... 135

H

Hackett, White v..... 290
Hastings, Smiles v..... 44
Hathorn, Humphrey v. 278
Hecker v. The New York Balance Dock Co 215
Hibbard, Bush v. 292
Hiler, Peck v. 178
Hodges v. Shuler,..... 68
Holmes v. Weed,..... 546
House v. Burr, ... 525
Howes, Wolfe v.,.....174, 666
Hubbard v. Russell, ... 404
Humphrey v. Hathorn, ... 278
Humphreys, The People ex rel. Rhoades v..... 521

I

Illinois Central Rail Road Co., Miller v..... 312

J

Jones v. Dana, ... 395

K

Keeler, Mead v. 20
Ketcham v. Woodruff, ... 147
Killmore v. Culver, ... 656
Kingsley, Swift v..... 541

L

Lockwood v. Thorne,..... 391
Lynch v. Tibbles, ... 51

M

Mathews, Wilson v. 295
Matter of Conover v. Devlin,..587 636
Mayor &c. of Albany, Benson v.. 248
———— N. York, Ramson v. 226
Mead v. Keeler, ... 20
Medical Society of Erie County, The People ex rel. Gray v..... 570
Miller v. The Illinois Central Rail Road Co.,..... 312
Monteath, Exchange Bank v..... 371
Morris Canal and Banking Co. v. Townsend, ... 658
Munn v. Barnum,..... 282

N

New York Balance Dock Co., Hecker v. 215
New York Central Rail Road Co., Chase v. 273
New York and Harlem Rail Road Co., Wheeler v. 414

P

Parish, Beale v. 243
Peart, Dwight v. 55
Peck v. Hiler, ... 178
Percy, Tibbits v. 39
People, ex rel. Gray, v. The Medical Society of Erie County, ... 570
People, ex rel. Kipp, v. Finger, .. 341
——— Niles v. Smith, ... 16
——— Rhoades v. Humphreys 521
——— Stryker v. Stryker, 649
——— Wood v. Draper, .. 265
Phelps, Brinckerhoff v. 100
Pier v. Finch, ... 514
Pindar, Reno v. 423
Powers v. Barr, ... 142

R

Ramson v. The Mayor &c. of New York, ... 226
Reno v. Pindar, ... 423
Rochester, City, Clarke v. 446
Rowland, Clinton v. 634
Russell, Hubbard v. 404
Rust, Deuel v. 438

S

Samuel v Berger, ... 163
Scidmore, Bangs v. 29
Second Avenue Rail Road Co. v. Coleman, ... 300
Selden v. The Delaware and Hudson Canal Co., ... 362
Shuler, Hodges v. 68
Smart v. Comstock, ... 411
Smiles v. Hastings, ... 44
Smith, Brown v. 419
——— v. Crouse, ... 433
———, The People ex rel. Niles v. 16
——— v. Wright, ... 170
Stryker, The People ex rel. Stryker, v. 649
Supervisors of New York, The Colonial Life Assurance Society, v... 166
Sweet v. Barney, ... 533
——— v. Bradley, ... 549
Swift v. The City of Williamsburgh, 427
—— v. Kingsley, ... 541

T

Thayer, Gleason v. 82
Thorne, Lockwood v. 391
Tibbits v. Percy, ... 39
Tibbles, Lynch v. 51
Torrey, Brown v. 583
Townsend, The Morris Canal and Banking Co. v. 658
Travis v. Barger, ... 614
Troy and Boston Rail Road Co., Foy v. 382

V

Van Nostrand, Budlong v. 25
Van Rensselaer v. Bonesteel, ... 365
——— v. Chadwick, ... 333
——— v. Gifford, ... 349
Van Schaick, Conant v. 87
Voorhies v. Voorhies, ... 150

W

Weed, Holmes v. 546
Wheeler v. The New York and Harlem Rail Road Co., ... 414
White v. Hackett, ... 290
Whitney, Burnside v. 632
Whyland, Filkins v. 378

Williamsburgh, City, Swift v. 427
Wilson v. Forsyth, ... 105
——— v. Mathews, ... 295
———, Youngs v. 510
Winfield v. Bacon, ... 154
Wiswall, Blackwell v. 355
Wood v. Draper, ... 187
Woodruff, Ketcham v. 147
Wolfe v. Howes, ... 174, 666
Wright, Smith v. 170

Y

Yates, Berry v. 199
Youngs v. Wilson, ... 510

CASES

IN

Law and Equity

IN THE

SUPREME COURT

OF THE

STATE OF NEW YORK.

DEVO and TRAVIS *vs.* BLEAKLEY.

B. leased to A. and I. certain premises, for brick making purposes, by lease, dated Jan. 25, 1853, "from the 1st day of April next, for and during and until the full end and term of five years," thence next ensuing, &c., yielding and paying therefor unto the lessor, yearly and every year, the yearly rent or sum of $4000, "in equal quarter yearly payments, to wit, on the first days of April, July, October and January, in each and every year during the said term." The lease also contained a covenant on the part of the lessees, to the effect that they would at all times have and leave upon said yard, brick enough to secure one quarter's rent, and in case of default in the payment of such rent, the lessor was authorized either to re-enter and take possession of the premises, or to enter upon said yard and take therefrom, and sell at fair market prices, brick enough to pay the rent so in arrear and unpaid. *Held* that the term commenced on the 1st day of April, 1853, and included that day; and that the first quarter's rent was payable on that day, in advance.

Held also, that the rent for the quarter commencing October 1, 1854, and ending January 1, 1855, was payable by the terms of the lease, on the first day of October, in advance; and that upon its remaining unpaid, the lessor was justified in entering upon the premises and selling brick enough to satisfy such rent.

Deyo *v.* Bleakley.

APPEAL by the defendant from a judgment entered at a special term, after a trial at the circuit, before a justice of the court, without a jury. The action was brought to recover the value of a quantity of brick taken by the defendant from premises occupied by the plaintiffs. The defendant leased certain premises at Verplanck, in Westchester county, for brick-making purposes, to Aaron and Isaac Mackey, by lease, dated January 25th, 1853, "from the 1st day of April next, for and during and until the full end and term of five years, thence next ensuing, and fully to be completed and ended, yielding and paying therefor unto the said party of the first part, his heirs and assigns, yearly and every year, during the said term hereby granted, the yearly rent or sum of four thousand dollars, lawful money of the United States, in equal quarter yearly payments, to wit, on the first days of April, July, October and January, in each and every year during the said term." The lease also contained a covenant on the part of the lessees, to the effect that they would at all times have and leave upon said yard brick enough to secure one quarter's rent, and in case of default in the payment of such rent, the lessor was authorized either to re-enter and take possession of the premises, or to enter upon said yard and take therefrom, and sell at fair market prices, brick enough to pay the rent so in arrear and unpaid. The defendant entered under the power contained in the last named clause, and took brick of the value of $414, for the payment of the rent of said premises, for the quarter beginning October 1, 1854, and ending January 1, 1855. The brick were so taken by the defendant, October 17, 1854, claiming that the rent of said premises was payable in advance.

The plaintiffs were assignees of Aaron Mackey, one of the les sees, and the brick in question were taken from their possession. Two quarter's rent of the premises, which accrued from April 1, 1854, to October 1, 1854, was paid by two notes dated on or about the first days of April and July, 1854, payable some two months after date, with interest. The above are all the facts material to the case, and were admitted by the parties. The judge who

held the circuit decided that the rent was not payable in advance, and ordered judgment for the plaintiffs for the value of the brick

Ferris & Frost, for the plaintiffs.

D. W. Travis, for the defendant.

By the Court, BIRDSEYE, J. There are few subjects upon which greater diversity of opinion has prevailed than in regard to the manner in which time should be computed, in the case of a contract like the lease in question in this action. The nature of the conflict that existed for a very long time upon the subject, clearly appears from the review of the previous cases made by Lord Mansfield, in *Pugh* v. *The Duke of Leeds*, in *Cowper*, 714. The true rule was undoubtedly laid down in that case, that the word "from" a day, may either *include* or *exclude* that day, according to the context and subject matter. And the court will construe it so as to effectuate the intentions of the parties, and not to destroy them. It is at the least very singular that the learned court which delivered this luminous decision should, but three years before, have given precisely an opposite judgment upon almost precisely the same state of facts. (*See Doe* v. *Watton*, *Cowper*, 189.)

The rule adopted in *Pugh* v. *The Duke of Leeds* is well stated in 2 *Parsons on Contracts*, 175, thus: that the computation shall always conform to the intention of the parties, so far as that can be ascertained from the contract, aided by all admissible evidence.

Let us look at the terms of this whole contract, in the light of these principles. The lease bears date January 25, 1853. The premises granted are a brick yard; and the landlord agrees to leave upon the yard all lumber then on said yard, and used for the purpose of manufacturing brick thereon, all arch irons and doors, and all wheelbarrows then thereon, theretofore used by Bennett, (the former occupant.) It also clearly appears that there were upon the leased premises, shafting, machinery fix-

tures, sheds, pits, boarding houses, barn and stables; and also that the clay for making the brick was to be taken from pits upon the demised premises. The lessees were also to have the use of all brick material, sand and clay, for the purpose of making brick on said yard, to be found on said premises. The period for which the lease was granted was "*from* the first day of April next, (1853,) for and during and until the full end and term of five years thence next ensuing." There is also a covenant for a renewal of the lease for a further period of five years, at the option of the lessees, the new lease to be "similar in all respects" to the old one. The annual rent reserved is $4000. Such, then, are the privileges granted by the lessor; the use for five years, with a privilege of extension to ten years, of such a property, both real and personal, at so large a rent; the personal property of a nature likely to suffer great depreciation during so long a term; and with the authority to convert the soil into brick, and sell the same, thereby diminishing the value of the freehold, and tending to deprive the lands and the fixtures of the plaintiff of their chief value as a source of future revenue. In return for such concessions, it was natural that the defendant should require, and that the lessees should covenant to give him, all the security which the nature of the case would permit. Accordingly, we find a covenant authorizing the plaintiff to re-enter, upon the non-payment of any part of the rent reserved, for the space of ten days after the day of payment, or "if default shall be made in any of the covenants" of the lessees. The tenants also agree that at the expiration or other sooner determination of the term thereby granted, they will leave upon the yard, lumber, arch irons and doors, wheelbarrows and other articles, to correspond with in number, and be equal in value, to those left thereon by the landlord. They also agree to have and leave on the yard, at all times, brick enough to secure one quarter's rent; and in case of the default of payment of the rent, the lessor is authorized either to re-enter and take possession as above mentioned, or to enter upon said yard and take therefrom, and sell at fair market prices, bricks enough to pay the rent so in arrear and

unpaid. The lessees also bind themselves to keep the said yard and all shafts, machines and the fixtures thereto, sheds, pits, boarding houses, barns and stables, in complete order and repair during the term, and at the expiration or other sooner determination thereof, to leave all of these things in good and perfect order and repair, so as to be in complete readiness for next season's work upon said yard. They also covenant to remove the gravel and screenings necessarily made in the working of the yard, according to the directions of the defendant; also to take and use the clay upon said premises to the bottom thereof, and to use it clean as they go; and finally, that they will not sub-let or re-let said premises, or assign the same or any part thereof, without the written consent of the lessor.

It is impossible not to perceive in all these provisions a careful design, upon the part of all these contracting parties, to give to the landlord the amplest security which the nature of the leased property or the means of the debtors admitted, for the large sums of money that might, in the course either of five or ten years, become due to him for rent. The power to convert the clay and other materials on the yard into merchandise and sell the same, and the *quasi* chattel mortgage on the brick to be manufactured on and from the plaintiff's ground, to the extent of one quarter's rent, are especially worthy of note, in my view of this case. It seems to me that all these circumstances and provisions are entirely in harmony with what is certainly a consistent reading and construction of the *habendum* clause of the lease, upon which the main question in this case arises. The tenants who had taken the plaintiffs' lands for such purposes, and with such powers, and who had in substance mortgaged the brick they might make for their rent, might well bind themselves to pay their rent in advance. As to the first quarter's rent, the quasi mortgage could give little if any security; and as to the future quarters, the nature of the property, and its liability to depreciation and injury, seem to afford good reason to the lessor for insisting that the rent should not be suffered to accumulate in arrears, while the brick yard and its fixtures might be left to go to ruin,

thus increasing the inducements which would lead the tenants to break their contract and abandon the property in such a damaged condition.

As, according to the uniform current of authority since the decision of Lord Mansfield, in *Pugh* v. *Duke of Leeds*, the expression in this lease denoting the commencement of the term, viz. "*from* the first day of April next," may be either inclusive or exclusive of the *terminus a quo*, as the parties may have designed; and as, immediately after this expression, there is another which seems to declare that the first day of April in each of the years of the term shall occur at its commencement; (for the rent is to be paid in equal quarter yearly payments on the first days of *April*, *July*, *October* and *January*, in each year;) and as these provisions are not only sensible and coherent in themselves, but are in entire consistency, when thus read, with the whole frame work of the lease, I am led to the conclusion that this term did commence on the first day of April, 1853, and included that day; and that the first quarter's rent was payable on that day in advance.

By this exposition the whole instrument is made harmonious. Every word has its effect and operation. No transposition is resorted to. There is in fact no *construction*, in the primary signification of that word; for the parties have made a complete and intelligible work in the contract as they executed it, and it needs not the reforming hand, or the explaining powers of the court, to make it clear and unambiguous. "There is no room for construction, and nothing for construction to do."

It is with great diffidence and regret that I differ from the learned judge who tried this case at the circuit. If transposition is *necessary*, in order to get at the intention of the parties, he is undoubtedly correct in his view; but no rule is better settled than that transposition shall not be resorted to, unless it is necessary for the purpose of carrying into effect the intentions of the parties.

The term *rent* does usually imply some enjoyment, some opportunity to realize a profit by the use of the thing demised, before the rent is payable. But it may be noted that the com-

mon enjoyment, the usual opportunity for realizing a profit by the use of the thing demised, does not, as is the case here, include the power of turning the land into merchandise and selling it for money. That is the great purpose of this lease. The execution of that purpose is constantly tending to destroy the value of the freehold in the demised property. In this case the rent is not merely, as stated by the learned judge, "a return of the thing enjoyed—a profit payable out of the increase of the land;" it is rather a compensation for not returning the thing enjoyed, and a price paid for the conversion of the land into merchandise, which is constantly tending to render the land incapable of returning any increase.

But if the terms of the whole lease, taken together, do not indicate a clear intention to make the rent payable in advance, (and in my opinion they clearly do,) if they only leave it doubtful which mode of payment was intended, then we may look to the acts of the parties under this lease, and see if they have put a practical construction upon it. And it appears that the rent of the two quarters immediately previous to that, the rent of which was intended to be satisfied by the sale of brick for which this suit is brought, was paid *in advance.* It may also be observed that unless the rent is payable in advance, the landlord is really left without security for the last quarter's rent of the premises; for the power of re-entry would be of no avail, after the termination of the lease; and upon an insolvency occurring at any time during the term, the tenants might hold till near the close of the quarter, strip the demised premises of the movable property thereon, dispose of all the brick made, and then, throwing up the lease, set the landlord at defiance. He would then have no redress but their personal responsibility. He has sought to avoid a reliance upon that with a care deserving, if it does not *command*, success.

Upon the whole, I am constrained to the conclusion that the rent of the demised premises for the quarter commencing October 1, 1854, and ending January 1, 1855, was payable, by the terms of the lease, on the first day of October, in advance, and that as it remained unpaid, the defendant was justified by the

lease given by him to the plaintiffs' assignors, in entering and selling the brick, for the taking of which this action is brought.

The judgment should be reversed and a new trial granted; costs to abide the event.

[Kings General Term, October 14, 1856. *Brown, S. B. Strong* and *Birdseye*, Justices.]

The People *ex rel.* George W. Niles *vs.* Smith.

24 16
45 265

When proceedings under the statute relative to forcible entries and detainers are brought into the supreme court on certiorari, it is within the power of the court to examine them, and to quash them, if found irregular or insufficient.

To constitute a forcible entry and detainer, it must be accompanied by circumstances of force, or terror in respect to the person. A mere naked trespass upon the premises is not sufficient.

Thus, where the proof showed a mere ordinary entry, made under claim of title, without great or unusual force, or any terror, and there were no unusual weapons; no acts of violence; and no menaces, threats or gestures, which could give any ground to apprehend injury or danger from standing in defense of the possession; *it was held* that the case was not brought within the words of the statute, or the mischief it was designed to prevent.

MOTION to quash proceedings in forcible entry and detainer.

J. L. Campbell, for the defendant.

G. W. Niles, relator, in person.

Birdseye, J. When the proceedings in a case like the present are brought into this court on certiorari, it is clearly within the power of the court to examine them, and to quash them, if found irregular or insufficient. That was done in *The People* v. *Reed*, (11 *Wend.* 157.) It cannot be that this court can be compelled to go through with these proceedings, without having the power or the opportunity to examine and

ascertain whether jurisdiction has been obtained, of the subject matter, or of the parties; and whether the statutory prerequisites have been complied with. And if such an inquiry is ever to be made, it should be made at the commencement. The party taking the objection should do so at the first opportunity, otherwise it may be that he waives it. The court must pass upon it whenever presented. It would be strange that the court must go through with the formality of a trial and judgment, before having power to decide whether the proceedings were duly instituted or regularly conducted.

The precept issued in this case for the summoning of the jury, was in the precise form required by the statute. (2 *R. S.* 508, § 3.) The fact that Randolph furnished to the constable who had received the precept the notices for the jurors, is not sufficient to warrant the setting aside of the inquisition. Randolph was a constable, duly qualified to execute the precept and summon the jury. What would be the proper course to take, if it were shown that Randolph received the names of the jurors from the relator, or acted in any manner under his influence or control, need not now be inquired. I can see no irregularity or impropriety in either the selection or summoning of the jury.

The objection that *talesmen* were illegally introduced on the jury, is also untenable. The command of the precept was that the constable should cause twenty-four inhabitants of the county, duly qualified to serve as jurors, to come before the judge, to inquire of such forcible entry or such forcible holding. This command is not fulfilled, merely by returning the process with a statement that that number of persons had previously been duly summoned. He is to "cause" them "to come before such judge." And if a sufficient number of those first summoned do not attend, he is to summon others and make due return until the precept has been complied with, and the requisite number of jurors are actually in attendance. Were not this the meaning of the statute, the proceedings would in many instances prove wholly nugatory. It is to the persons thus "returned summoned," that the oath is to be administered.

The only remaining question, or rather perhaps the only question worthy of examination, is whether any evidence of a forcible entry was given to the jury.

It has been truly said, (9 *John.* 156; 11 *Wend.* 159,) that the proceedings under the statute to prevent forcible entry and detainer are of a peculiar and anomalous kind. They are loose, and of a mixed nature, being in substance a civil, and in form a criminal prosecution. The original statutes on the subject were solely criminal in their character; and designed only to preserve public peace, and restrain all persons from the use of violent means of doing themselves justice. And though, in process of time, by the gradual addition of provisions looking to the restitution of the property forcibly taken or detained, the remedy has become a private rather than a public one, still the form of the proceeding, and the rules of law which govern it, still remain to a great degree unchanged. It has always been held that to make an entry forcible, it ought to be accompanied with some circumstances of actual violence or terror; and, therefore, an entry which hath no other force than such as is implied by the law in every trespass whatsoever, is not within these statutes. (*Hawk. P. C., b.* 1, *ch.* 64, § 25.) And of a forcible detainer it is said, (*Id.* § 30,) that the same circumstances of violence or terror which will make an entry forcible, will make a detainer forcible also; from whence it seems to follow, that whoever keeps in his house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor, if he dare return, shall be adjudged guilty of a forcible detainer, though no attempt be made to re-enter.

It is said, in *Bacon's Abridgment*, (*vol.* 2, *p.* 558, *Forcible Entry and Detainer, B,*) that the entry must be with a strong hand, with unusual weapons, or with menace of life or limb. (*See also The People* v. *Rickert*, 8 *Cowen*, 232; *and Willard* v. *Warren*, 17 *Wend.* 257.) The latter case was a civil action, under 2 *R. S.* 338, *tit.* 6, § 4, to recover treble damages for a forcible entry and disseizin, &c. The kind and amount of force required to be shown, is there stated to be the same on the

criminal and civil side; and the authorities are examined at length. It is sufficient to refer to that case, for a full view of those authorities. The conclusion arrived at was, that there must be circumstances of force or terror in respect to the person; and that a mere naked trespass to lands or outhouses never was yet holden sufficient.

In the case at bar, both the complaint and inquisition are for forcibly entering and forcibly holding the premises in question, which are a vacant lot on Grand street. The only evidence given on behalf of the complainant, was that of Zachariah Coleman. He states that he had possession of the lot, for George W. Niles, from 1850, up to about six months since; had it all inclosed, and front fence under lock and key; used it as a yard for the stable and houses adjoining. He put up a new fence in the rear, and aftewards in front. About six weeks ago Smith, the defendant, came and took possession and built a fence. He had a butcher's shop on the corner of it. He took the front fence and stuff. "My fences were knocked down. I was away, and when I returned I found the fences were down, and Smith was building on part of the lot, with part of the fence." He also says he saw some one cutting down the fence. This is the whole testimony as to the entry, and there is no evidence whatever as to the holding out.

It is obvious that this proof falls altogether short of that which the well settled rules of law require. The case shown is that of a mere ordinary entry, made under claim of title. If the defendant has no title, it is a common trespass There was no great or unusual force; there was no terror; and if there was either, it could not relate to the person of the prior occupant. There were no unusual weapons; no acts of violence; no menaces, threats, signs or gestures, which could give any ground to apprehend injury or danger from standing in defense of the possession. The case is not brought within the words of the statute, or the mischief it was designed to prevent.

I feel the less hesitation in applying to these proceedings the familiar rule, that as they are summary and statutory, they must be strictly conformed to the statute, and are open to tech-

nical objections, (*Farrington* v. *Morgan*, 20 *Wend.* 207,) for no substantial right of either party could be settled by going to trial in this case. A trial and decision could only show which party is to remain in possession during the pendency of the action which is to establish the title to the lot. If the relator were restored to the possession, the real litigation would still remain. It is better that it be resorted to forthwith. If successful in that, he can recover all the damages he may sustain by reason of having been deprived of the possession.

The inquisition must be quashed, with costs.

[Kings Special Term, February 23, 1857. *Birdseye*, Justice.]

24 20
26a 414

Mead *vs.* Keeler.

Where a promissory note, purporting to be the note of a manufacturing corporation incorporated under the act of March, 1811, was signed by a clerk, in the name of the general agent of the corporation, as agent, by his direction, and it was shown that the note was in the form which had been customarily used and approved by the company in other similar cases, and which had always been recognized by them, and the money for which it was given was used by the company in its business; *Held*, that this was sufficient proof of the execution of the note by the company to go to the jury; and to warrant the jury in finding that the company had adopted, by usage, the signature of their agent as their own, and intended to be bound by it.

A company incorporated under the act of 1811, has power to borrow money to be used in its legitimate business, and to bind itself in its corporate capacity, by a written obligation for its payment.

After a manufacturing corporation has been recognized by the court as a duly constituted corporation, under the act, and has claimed to be and has acted as such for over twenty years, and an individual has recognized its corporate existence by becoming the owner of a portion of its stock and continuing to hold it until the dissolution of the company, he will not be permitted, when sought to be made liable for a debt of the company, to allege that the corporation has never been legally incorporated.

MOTION by the plaintiff to set aside a nonsuit, and for a new trial; ordered to be heard at the general term in the first instance. The action was tried at the Cayuga circuit in

October, 1855, before Justice STRONG and a jury. In March, 1831, a company was organized under the act of the legislature, passed March 22, 1811, entitled "An act relative to incorporations for manufacturing purposes," (1 *R. S. 4th ed.*, 1210,) by the name of the "Moravia Cotton Mill." The certificate of incorporation declared the object of the company to be "for the purpose of establishing a cotton manufactory in the village of Moravia, town of Sempronius, county of Cayuga." The company went into business after its incorporation, and continued to do business until shortly before the 10th day of January, 1851, when proceedings were instituted in the supreme court with a view to dissolving the corporation, which resulted on the 6th day of May, 1851, in a regular judgment dissolving the corporation. The action was brought to recover of the defendant the amount of a debt alleged to be due from said company, on the ground that he was one of its stockholders at the time of its dissolution. The other facts appear in the opinion of the court. The plaintiff was nonsuited, upon the trial.

D. Wright, for the plaintiff.

Geo. Rathbun, for the defendant.

By the Court, WELLES, J. It appeared upon the trial that on the 21st day of January, 1850, one Gideon Briggs lent the company $155, for which a note was given in the following words and figures:

"$155.00. For value received, the Moravia Cotton Mill promise to pay Gideon Briggs or bearer, one hundred and fifty-five dollars, with interest. A. CADY, Agent.

Moravia, Jan. 21, 1850. *per* G. C. DIBBLE."

Dibble testified that the Moravia Cotton Mills organized and did business under the certificate of incorporation, which had been read in evidence. That he was in their employ for ten years, up to the fall of 1850, as clerk. That Artemas Cady was the agent of the company in January, 1850, and he, the witness, was clerk. That the signature of the note was in the witness' handwriting. That the note was given for borrowed

money. That he was in the habit of executing notes in this manner for the company, and with their knowledge. That he did it by direction of their agent. That the money borrowed of Briggs, for which the note was given, was used by the company in their business. It appeared that the defendant was a stockholder in the company from a time previous to the date of the note until the judgment of the court dissolving the corporation, to the amount of ten shares, or $1000. At another stage of the trial, the witness Dibble was recalled, and testified that he frequently gave the company's notes for borrowed money and for work, in the same manner as the one on which this action is brought, and that they were paid from time to time by the company. That he had frequent conversations with the trustees about borrowing money for the company. After the plaintiff rested, the defendant's counsel moved the court to nonsuit the plaintiff, on the following grounds: 1. That the note was not executed in a form to be binding upon the company or the stockholders. 2. That the corporation had no right to borrow money. 3. That the "Moravia Cotton Mills" never had been legally incorporated; that the certificate by which they claimed to be incorporated was defective, in not stating the number of trustees, and their names, who were to manage the concerns of the company the first year. The justice decided that the Moravia Cotton Mill had no authority to borrow money, and that the note upon which the action was brought having been given for borrowed money, was void; and thereupon the said justice nonsuited the plaintiff.

I shall consider the questions raised at the circuit on the motion for a nonsuit, in the order in which they were presented.

1st. As to the form of the note. Evidence was given, tending to show that it was in the form which had been customarily used and approved by the company in other similar cases, and which had always been recognized by them, and the money for which it was given was used by the company in its regular legitimate business. Again: Cady was the agent, *prima facie*, the general agent of the corporation, with power to bind his principals, in legitimate contracts. Dibble signed the name of

Cady, as agent, by direction of the latter. This, in my judgment, was sufficient to send the question of the execution of the note, by the company, to the jury. The jury would have been warranted, upon the evidence, in finding that the company had adopted, by usage, the signature of their agent as their own, and by which they intended to bind themselves. The form of the body of the note is a promise by the company.

2. As to whether the "Moravia Cotton Mills" were competent to bind themselves upon a contract for borrowed money, to be used in their business. That they were capable of incurring pecuniary liability, is apparent from the seventh section of the act under which they were incorporated, (1 *R. S. 4th ed.* 1211,) which makes the stockholders personally liable, to the extent of the amount of their stock, for all debts due by the company at the time of its dissolution. How the debts must originate or be contracted, for which the stockholders are thus made liable, is not stated in the act. Manifestly, all debts which the corporations, contemplated in the act, were competent in law to contract, are intended. The power to borrow money is not expressly given, either in the act above mentioned, or in the title of the revised statutes defining the general powers of corporations. (1 *R. S. 1st ed.* 599, 600; *4th ed.* 1172.)

The second section of the first mentioned act declares that corporations formed under it, "shall in law be capable of buying, purchasing, holding and conveying any lands, tenements, hereditaments, goods, wares and merchandise whatever, necessary to enable the said company to carry on their manufacturing operations mentioned in such certificate." It will not be denied, that under this provision, the company had power to do and perform all incidental acts and things necessary to carry out and effectuate the express powers granted. Among the express powers, are those of buying and purchasing personal property necessary to carry on their operations; and among their implied powers, it cannot be doubted, was that of hiring workmen. It will probally not be denied that they had the power to execute their promissory notes upon the purchase of such personal property, or in liquidating the claims of their

employees, in their legitimate business and transactions. Indeed, this seems to be conceded on the part of the defendant. And I think it equally clear that they possessed the power to borrow money for the same purposes, and to bind themselves in their corporate capacity, by a written obligation for its payment. To concede to them such powers would violate no law or positive principle of public policy. It would be doing no more than nearly every large business establishment finds it necessary occasionally to resort to. It is to be presumed that a corporation will conduct their operations in detail substantially upon the same principles and in the same manner as individuals engaged in the like business. And when they do so, and confine themselves to the purposes and objects of their incorporation, they should not be deemed as transcending their authority, but should be regarded as acting within the scope of those implied, incidental powers necessary to the full and advantageous development of those which are expressly given. In this case, the evidence shows that the borrowed money for which the note in question was given, was used by the company in their business. We are not, in the absence of evidence, to intend that such business was unlawful. (*Wood* v. *The Auburn and Roch. R. R. Co.* 4 *Seld.* 160. *Bank of Poughkeepsie* v. *Ibbotson*, 24 *Wend.* 473. *Beers* v. *The Phœnix Glass Company*, 14 *Barb.* 358. 2 *Kent's Com.* 299, 3d *ed.* *The People* v. *The Utica Ins. Co.* 15 *John.* 358, 383.)

If these views are correct, the nonsuit, which was granted solely upon the ground just considered, was erroneous; unless the remaining ground taken by the defendant's counsel at the trial should prevail. That was,

3d. That the "Moravia Cotton Mills" had never been legally incorporated. The first section of the act of 1811, before cited, provides that the certificate of incorporation shall contain, among other things, "the number of trustees, and their names, who shall manage the concerns of the company for the first year." The certificate in this case omits such statement, which is the ground of the objection now being considered. This company went into operation in 1831, as a corporation under the act of

1811, and continued so in operation for about twenty years, when it was dissolved by the judgment of this court. The evidence shows that they acted by trustees, and I think their corporate character may be legally upheld, by treating the provisions of the act, which is the foundation of the objection, not as fundamantal, but as directory. The company has been recognized as a duly constituted corporation under the act by this court, has claimed to be and acted as sueh, and the defendant has recognized its corporate existence by becoming the owner of a portion of its stock, and continuing to hold it until the company was dissolved. After all this, it will not be permitted the defendant to maintain that the corporation had no legal existence. The case of *Rosevelt* v. *Brown*, (1 *Kern.* 148,) was an action to recover a debt against this same company on the ground that the defendant was a stockholder. The point does not appear to have been taken in that case; and yet it is singular that it was not, if there was any foundation for it.

The nonsuit should be set aside and a new trial granted, with costs to abide the event.

Ordered accordingly.

[Monroe General Term, March 2, 1857. *T. R. Strong, Welles* and *Smith*, Justices.]

---

24 25
16h 584

S. H. & B. Budlong *vs.* Van Nostrand.

The admission of leading questions, in the examination of a witness, is always in the discretion of the court, subject, however, to be reviewed, and will not be regarded as error unless the discretion has been abused.

A witness will not be allowed to testify as to a conversation in which a previous witness was engaged, for the purpose of impeaching him, unless such previous witness has first been interrogated upon the subject of that conversation.

The declarations of an agent may be proved, as binding upon his principal, only when they constitute a part of the *res gestæ*.

The admission or declaration of the agent, in order to bind the principal, must accompany and relate to some authorized act of the agent, *et dum fervet opus*.

Budlong *v.* Van Nostrand.

If made after the time for the performance of a contract has expired, and after the rights of the parties have become fixed, and the duties of the agent, as such, are at an end, they will not bind the principal.

APPEAL from a judgment of the Cayuga county court, reversing a judgment of a justice of the peace. The facts appear sufficiently in the following opinion.

J. Benedict, for the appellants.

F. M. King, for the respondent.

By the Court, WELLES, J. The action before the justice was brought by the Budlongs against Van Nostrand, to recover damages for the breach of a contract for the delivery by the latter of 500 bushels of oats, at 50 cents per bushel. The cause was tried on the 28th of May, 1855, when the plaintiff recovered judgment for $40.50 damages and $2.41 costs. The county court reversed this judgment, and the plaintiffs appealed to this court. Upon the trial before the justice, Chauncey K. Higley was sworn as a witness for the plaintiffs, and testified that the plaintiffs were partners in business, during the winter and spring previous to the trial, in buying grain at the rail road depot in Mentz, for the Albany and New York markets. At that place (Mentz) the witness was acting as agent for them in buying grain. That his business was buying and taking in grain, oats and corn. The witness then gave evidence tending to prove the contract with the defendant, as stated, in which the witness acted as agent for the plaintiffs in making the contract, and that the plaintiffs were not present, and that he disclosed his agency to the defendant at the time and paid him one dollar to bind the bargain; also that the defendant had delivered, under the contract, 319 bushels of oats and no more, for which he had received his pay at the price stipulated. That he then told the witness that he would not deliver any more oats, as they were worth 20 to 25 cents more per bushel to the plaintiffs than the witness had agreed to pay for them. It appeared by the testimony of this witness, that at the time he and

the defendant commenced talking about the contract for the purchase of the oats, they were in the barn yard, when the defendant told him he did not know how many he had to spare, and that whatever he had to spare he should have at 50 cents per bushel, and that he wished to reserve enough to feed his horses, and to sow. That the witness and defendant then went to the granary to see the oats, 10 or 15 rods off, and while at the granary the quantity was fixed which the defendant was to deliver at 500 bushels. The one dollar to bind the bargain was paid to the defendant in the barn yard before they went to the granary to examine the oats. The plaintiff asked the witness the following question: "Was the conversation in the granary a continuation of the one had in the barn yard?" This was objected to by the defendant, and the objection overruled. No ground was stated for the objection. The matter of the question was competent. The only possible objection to it was that it was leading, and this is always in the discretion of the court, subject, however, to be reviewed, and will not be regarded as error unless the discretion has been abused. Besides, it is always necessary to specify the ground of objection, where it is to the form of the question, so that, if necessary, it may be varied. A similar question arose upon an objection to an inquiry by the plaintiffs of another witness, viz: "Were the plaintiffs partners in buying grain at the time of this contract in March last?" and the same remarks are applicable to it.

Among the witnesses introduced by the defendant, was one by the name of Charles Howell, who testified that he heard a conversation between the defendant and Higley, on the bridge in Port Byron, "in this month," (the month of May, 1855.) The defendant then put the following question to him: "What was that conversation?" to which the plaintiff objected, on the ground that Higley should be first interrogated on that point, if it was the defendant's object thereby to impeach him. The defendant stated that such was his object, and also to show Higley's admissions. The justice sustained the objection and excluded the evidence. The defendant then put a number of questions to the witness Howell, with a view to prove Higley's

statements and admissions in the conversation referred to, touching the contract and its fulfillment, which were all objected to severally, and the questions were overruled by the justice. So far as the questions were designed to impeach Higley, they were improper, for the reason stated in the objection, to wit, that Higley had not been interrogated on the subject. Nothing is now better settled.

On the question whether the declarations of an agent may be proved as binding upon his principal, the rule is, that such declarations are only admissible when they constitute a part of the *res gestæ*. The principal constitutes the agent his representative in the transaction of certain business; whatever, therefore, the agent does in the lawful prosecution of that business is the act of the principal, whom he represents; and where the acts of the agent will bind the principal, there his representations, declarations and admissions respecting the subject matter will also bind him, if made at the same time, and constituting a part of the *res gestæ*. The admission or declaration of the agent, to bind the principal, must accompany and be in relation to some authorized act of the agent, *et dum fervet opus*. It is because it is a *verbal act* that it is admissible at all. (1 *Greenl. Ev.* §§ 113, 114.) The offer in this case was to prove certain declarations of the witness Higley, made in May. The offer did not include the fact that any thing was being done or attempted at the time the declarations were made. The time for the delivery of the oats had expired, and the rights of the parties were fixed; and it does not appear that Higley had authority from the plaintiffs to do any thing further in relation to the transaction, much less to bind them by his admissions. The contract was made between the 5th and 10th of March, and the oats were to be delivered in two weeks, which was afterwards extended a week or ten days. Higley's agency extended to buying and taking in the oats, and nothing further. There is no point of view in which the defendant was entitled to the evidence, and the justice was right in excluding it.

The respondent's counsel urges that the contract was void

under the statute of frauds, (2 *R. S.* 136, § 3,) on the ground that, at the time it was made, no part of the oats were received by the plaintiffs and no part of the purchase money paid, and the agreement was not in writing. But there is nothing in that. There was confessedly but one contract, and that the justice has found was in the granary, for 500 bushels. What was said in the barn yard, if it amounted to a contract, was modified when the parties came to the granary; at least the justice must have so found, and the earnest money paid in the barn yard will be taken as applying to the modified contract.

The judgment of the county court should be reversed, and that of the justice affirmed.

Ordered accordingly.

[Monroe General Term, March 2, 1857. *T. R. Strong, Welles* and *Smith*, Justices.]

Bangs, receiver, &c. *vs.* Scidmore.

24 29
21a 136

Where the act incorporating a mutual insurance company declared that all persons who should insure with the corporation should thereby become members thereof, during the period they should remain so insured, and no longer; *Held*, that the fair interpretation of this provision was that persons insured by the company should respectively remain members of the corporation during the time their policies, by their terms, were to continue; and that such membership would not be terminated by a total loss of the property insured. Smith, J., dissented.

It was accordingly *held*, that a premium note, given by a person, on becoming a member of a corporation, was liable to assessment, during the life of the policy, although the property insured had been destroyed by fire before the assessment was made.

THIS action was brought by the plaintiff as receiver of the property and effects of the Genesee Mutual Insurance Company, to recover the amount of a premium note given by the defendant to said company, which note was in the words and figures following:

"$420. For value received in policy No. 5265, dated November 20th, 1847, issued by the Genesee Mutual Insurance Company, I promise to pay the said company, or their treasurer for the time being, the sum of four hundred and twenty dollars, in such portions and at such times as the said company may, agreeably to their act of incorporation, require.

WM. E. SCIDMORE."

On the trial before Justice T. R. STRONG, at the Monroe circuit, in January, 1856, the plaintiff proved that the Genesee Mutual Insurance Company was duly incorporated by an act of the legislature of this state, on the 3d day of May, 1836, and the corporation was duly organized the first day of June, 1836, in the village of Le Roy, in the county of Genesee. That the plaintiff was duly appointed receiver of the property and effects of said corporation on the 7th day of October, 1851. That on the 20th day of November, 1847, the plaintiff became insured upon his steam saw mill, by the said Genesee Mutual Insurance Company, by policy No. 5265, in the sum of $1500, and at the same time gave his note, of which the above is a copy. That on the 16th day of June, 1852, the plaintiff, under the direction of the supreme court, made an assessment upon the premium notes then held by him as such receiver, and among the notes so held, was the note above mentioned of the defendant, and upon which the plaintiff, as such receiver, assessed the defendant the sum of $139.78, the proportion of the losses and incidental expenses which accrued to the said insurance company after the first day of August, 1848, and which sum was the proportion according to the amount of the defendant's premium note, and that the plaintiff, as such receiver, required the payment of the said assessment of $139.78, by the defendant, and gave the defendant the requisite notice, as prescribed by the statute and by-laws of the company in such case; and rested.

The defendant gave in evidence the policy of insurance referred to above, which recited that the defendant had become a member of said company and had secured to the company the sum of $420, being the deposit or premium for insuring the sum of $1500, &c. on the said steam saw-mill, during the term

of five years, commencing at noon on the 20th day of November 1847, and ending at noon on the 20th day of November, 1852. The policy then contained provisions for insuring the property described, for the consideration aforesaid, in said sum of $1500, against loss or damage by fire during the period aforesaid. The defendant also proved, that on the 1st day of May, 1848, the property insured was wholly destroyed by fire, and that on the first day of August, 1848, the said company paid to the defendant the whole amount of insurance, deducting from the amount thereof the defendant's proportion of all losses and incidental expenses that had occurred and had been incurred by the company, up to that time.

The defendant's counsel contended that the defendant was not liable upon his premium note. That after the first day of August, 1848, the defendant ceased to be a member of said corporation, and thereby ceased to be responsible for any losses that the company might sustain. The justice overruled the position of the defendant's counsel, and directed a judgment in favor of the plaintiff for $362.75, being the balance of the premium note; and judgment was entered accordingly. The defendant's counsel duly excepted to the rulings of the judge. This is an appeal from that judgment.

S. B. Jewett, for the appellant.

S. Mathews, for the respondent

Welles, J. The act incorporating the Genesee Mutual Insurance Company, was passed May 3d, 1836. (*Sess. Laws of* 1836, *ch.* 241.) By section 3 of that act it was declared, that the corporation thereby created should possess all the powers and privileges and be subject to all the restrictions and limitations which were granted to, or imposed upon, "The Jefferson County Mutual Insurance Company" by the act incorporating that company, passed March 8th, 1836. (*Id. ch.* 41.) By the 2d section of the last mentioned act, all persons who should thereafter insure with the corporation, should thereby become

members thereof, *during the period they should remain so insured, and no longer.* The 8th section of the same act provides that every member of the company shall be bound to pay for losses, &c. in proportion to the deposit note. The section then declares that the buildings insured, and the right, title and interest of the assured to the lands on which they stand, shall be pledged to the company, which shall have a lien thereon in the nature of a mortgage, to the amount of the deposit note, *which shall continue during his policy;* such lien to take effect whenever the company shall file and have entered, &c. a memorandum of the name of the individual insured, a description of the property, the amount of the deposit note, and the term for which the policy shall continue. The position taken by the defendant is, that upon the destruction of the insured property, and the payment, by the company, of the insurance, he no longer remained a member of the company or liable to contribute to any losses, &c. that might thereafter occur, although the time for which the policy was issued had not expired. The substance of the argument is, that when the property was destroyed, the risk was at an end, and with it the relation of assurers and assured between the parties; and that upon the termination of such relation, the defendant, by force of the 2d section of the act, ceased to be a member of the corporation; and as, by the 8th section, none but members of the corporation are liable to pay for losses, &c., and the defendant, for the above reason, not being such member, is not liable for losses, &c. arising after he so ceased to be a member of the company. Upon a careful examination and consideration, however, of the foregoing, with other sections of the act, I am satisfied that such was not the intention of the legislature.

In the first place, it should be remembered that by the express terms of this contract of insurance, the liability of the parties was continuous, running through five years. That of the plaintiffs was onerous upon them, in proportion to the time during which the policy, by its terms, was to continue. Upon the general principles of insurance, they could afford to take the risk for one year only, at just one-fifth of the premium

that they could afford to take it for five years, and in the same proportion for a longer or shorter period. There may be considerations which would justify taking risks for long periods at premiums less in proportion than for short periods; such, for example, as getting a larger amount of capital pledged in deposit notes, securing the patronage of the assured for a longer period, saving the expense of new policies, &c.; but none which affect the principle stated. The actual risk, as a general rule, is increased, upon a given piece of property, exactly in proportion to the time it is to continue. In this respect, there is no difference between mutual insurance and stock companies. It would therefore be manifestly unequal and inequitable to release the defendant from his engagement, before the expiration of the time which, by the terms of his undertaking, it was to continue, because the contingency has happened, which was to render absolute the plaintiff's liability, to the utmost extent which the contract contemplated. It would be, in effect, to release the defendant from a portion of his obligation, when the whole of it was the consideration of the plaintiffs' engagement, because the latter have performed, to the last extremity, the whole obligation to which, by the terms of their contract, they could in any event be subjected. The injustice of such construction is illustrated by supposing a company to consist of 100 members, each of whom has an insurance of $1000 for five years; all taken at the same time, and each having given a deposit note for $1000. A total loss happens to one of the members at the end of one week from the commencement of the five years. The members pay this loss by a contribution of $10 each. Immediately afterwards another member sustains a total loss, which, according to the defendant's argument, must be paid by the remaining 99 members. Suppose like losses continue to occur at short intervals, until they amount, in the aggregate, to a sum sufficient to exhaust the whole amount of deposit notes, which, on the principle contended for, remain in force. A computation will demonstrate that when 64 such losses should be paid, to say nothing about expenses, the whole capital of $100,000, being the total

amount of the original deposit notes, would be used up, and the policies of the remaining 36 members entirely worthless. The case supposed is a strong and plain one, but it shows the workings of the rule contended for, more or less palpably in every case; and exhibits a scheme any thing but mutual or equitable.

If it should be said that the 11th section of the act contains provisions for making good losses after the amount collectable on the deposit notes is exhausted, the answer is, in the first place, that such provision is liable to be entirely inadequate, and would always be found less prompt and advantageous to the sufferer than a direct resort to the capital secured by deposit notes. But, in the second place, the conclusive answer is, that the assessment thereby authorized, is to be on the *members of the company*, who, according to the defendant's argument, are only those who remain insured, and do not include such persons as have sustained total losses. But the act under which this company was incorporated, upon a fair interpretation, and a comparison of its several sections, will not be found to lead to any such unreasonable result, as, it seems to me, the defendant's position tends to establish.

By section 6, every person becoming a member of the corporation, by effecting insurance therein, shall, before he receives his policy, deposit his promissory note for such sum as the directors shall determine, a part, not exceeding five per cent thereof, to be immediately paid; *and the remainder of the note shall be payable, in part or the whole, at any time* when the directors shall deem the same requisite for the payment of losses by fire, and such incidental expenses as shall be necessary for transacting the business of the company; *and at the expiration of the term of insurance*, the said note, or such part of the same as shall remain unpaid, after deducting all losses and expenses occurring *during said term*, shall be given up to the maker thereof. The words "*term of insurance*," evidently refer to the term of time for which, by the policy, the insurance shall continue. They will certainly bear such construction

without violating their ordinary and popular sense, and this is what, I have no doubt, the legislature intended.

The 7th and 11th sections contain provisions by which persons insured may terminate their liability to contribute to the payment of losses, before the expiration of the time for which they are insured. By section 7, it may be done by alienating the property insured; and by section 11, by payment of the whole of the deposit note and surrendering the policy before any subsequent loss or expense has occurred. There is nothing else to be found in the act, providing for or contemplating the termination of the liability of a member or person who becomes insured, prior to the expiration of the time for which, by the terms of his policy, the insurance is to continue. This circumstance adds force to the argument in favor of the continued liability of a member during the whole time for which he became insured.

In this and most, if not all, mutual insurance companies, every person insured becomes a corporator, with stock in the corporation, to the amount of his deposit note. These notes constitute the capital stock of the company, upon which to rely for the payment of losses and expenses; and the members have no right to withdraw themselves, or the stock thus held by them, from the company, before the time for that purpose provided in their contract of insurance, except in the two cases provided in sections 7 and 11, before referred to.

By the 10th section of the act under consideration, if a member neglects the payment of an assessment for thirty days after notice, the directors may sue for and recover the whole amount of his deposit note or notes with costs, and the amount thus collected shall remain in the treasury of the company, subject to the payment of such losses and expenses as have accrued or may thereafter accrue; and the balance, if any remain, shall be returned to the party from whom it was collected, on demand, after thirty days from the expiration of the term for which insurance was made. These provisions are inconsistent with the idea of a termination of the liability of the maker of a deposit note, upon a total loss being sustained by him. By the de

fendant's theory, the individual, the whole amount of whose deposit note had been collected under the above 10th section, should be entitled to have his money thus collected, or such part of it as was not applicable to the payment of losses and expenses then accrued, refunded, whenever the property, embraced in his policy, should be totally destroyed. But that would be a plain violation of the section last referred to. The case of *Wilson* v. *The Trumbull Mut. Fire Ins. Co.* (7 *Harris' Penn. R.* 372,) is cited and relied upon by the defendant's counsel as an authority in support of his positions. That case may have been well decided, if the defendant's charter contained a provision similar to that embraced in the 7th section of the act under which the plaintiffs in this case was incorporated, in relation to alienating the insured property. In the case referred to, the assured had sold the property insured, before the loss happened for which he was assessed, which the court held dissolved his relation with the company as a member, and consequently terminated his liability on his deposit note. It will be perceived, therefore, that it is not applicable to the present case.

The foregoing are among the considerations which have led me to the conclusion, that by a fair and correct interpretation of the 2d section of the act, persons insured in the company shall respectively remain members of the corporation during the time their policies, by their terms, are to continue; and that such membership is not terminated by a total loss of the property insured. This construction is no violation of the terms of the section, and is necessary, to avoid inconsistency with other sections, and in harmony with the scope and spirit of the whole act. I am therefore of the opinion that the judgment appealed from should be affirmed.

T. R. Strong, J., concurred.

E. Darwin Smith, J. The second section of the act to incorporate the Jefferson County Mutual Insurance Company, which, by the terms of the act incorporating the Genesee Mu-

tual Insurance Company, of which the plaintiff is receiver, became part of its charter, (*Sess. Laws of* 1856, *ch.* 241, *p.* 318, *Id. ch.* 41, *p.* 421,) is as follows: "All persons who shall hereafter insure with the corporation, and also their heirs, executors, administrators and their assigns continuing to be insured in said corporation, as is hereinafter provided, shall thereby become members thereof during the period they shall remain insured by said corporation, and no longer." By the express terms of this section, one who insures in said corporation there by *becomes a member thereof*, and during the period he shall remain insured, continues such member, and *no longer*. Section 6 provides, also, that "Every person who shall *become a member of said corporation*, by effecting an insurance therein, shall deposit his promissory note for such sum of money as shall be determined by the directors, before he receives his policy." Section 8 provides, that "Every *member of said company* shall be bound to pay for losses and such necessary expenses accruing in said company, in proportion to his deposit note." Section 9 provides, that "suits at law may be maintained by said corporation against any of *its members*, for the collection of such deposit notes or any assessments thereon," &c. Section 10 provides, that "After receiving notice of any loss or damage by fire, *sustained* by any *member*, and ascertaining the same, the directors shall settle and determine the sums to be paid by the *several members thereof, as their* respective proportions of such loss, and publish the same, as they shall see fit, and the sum to be paid by *each member* shall always be in proportion to the original deposit note." "And if any *member* shall, for the space of thirty days after the publication of said notice, neglect or refuse to pay the sum assessed upon him, the directors may sue for and recover the deposit notes," &c. Thus it will be seen that all the provisions of the act relating to the liability to contribute to pay for losses, and to the maintenance of suits therefor, apply only to *members* of the corporation. It would seem to follow, as a necessary consequence, that when the relation of membership in the corporation ceases, the liability to contribute to pay for

losses incurred also ceases. Membership and the liability to pay for losses, or the relation of insurer and insured, are inseparable. They must coexist. When the property embraced in the policy of insurance issued to the defendant was destroyed by fire, he was thereafter "*no longer*" a *member* of the corporation. He ceased to be a member as much so as if he had sold or alienated the property. It is true that the charter, section 7, provides that "When any property insured by the corporation shall be alienated by sale, or otherwise, the policy shall thereupon be void." But this was entirely unnecessary. Such consequence would have followed in law without this express provision, for the contract of insurance is a contract to indemnify the insured against loss or damage to his property from fire, and when the property is sold or aliened or destroyed, the contract of insurance is necessarily at an end.

The theory of mutual insurance is, that each member agrees, concurrently with the other members, and in consideration of a like agreement as to himself, that he will assure each and every other member against loss by fire, and will contribute to pay all losses, while he continues thus insured, on his part. The assessments he pays are like the premiums paid by the insured in stock companies, and, in like manner as the duty to pay premiums in stock companies, ceases when the property insured is destroyed by fire, so the liability to pay assessments in mutual companies ceases for the same reason on a like destruction of the property insured.

The point, too, I think is expressly decided by the supreme court of the state of Pennsylvania, in *Wilson* v. *Trumbull Mutual Ins. Co.* (7 *Harris' Penn. State Rep.* 372.) That was a case of insurance upon goods, like the policy in this case, and the defendant had sold the goods some time before the loss happened for which he was assessed. The charter was much like the charter in this case. It was held that he was not liable for losses accruing after the sale of his goods. Judge Lowrie, in giving the opinion of the court, says: "In mutual insurance companies all the insured are members, and all members insured. If a member perform all his duties and pay

his share of all losses accruing during his *membership*, no more can justly be required of him, and if he does so his deposit note is thereby *canceled*. It cannot be used to enforce contribution for losses arising after he ceased to be insurer or insured."

When the defendant ceased to be a member of the Genesee Mutual Insurance Company, he clearly ceased to be liable for losses thereafter accruing.

The judgment should be reversed and a new trial had, with costs to abide the event.

Judgment affirmed.

[MONROE GENERAL TERM, March 2, 1857. *T. R. Strong, Welles* and *Smith*, Justices.]

TIBBITS *vs.* PERCY and L'AMORAUX.

The obligation of a lessee, for the payment of the rent reserved in the lease, and the obligation of a third person, who, by a separate instrument executed at the same time with the lease, guaranties the payment of the rent, by the lessee, are separate and not joint, and will not support a joint action by the lessor, against the lessee and the guarantor.

The obligation of the lessee is primary and absolute; and that of the guarantor, secondary and conditional.

But if a misjoinder, of this description, is not objected to in the court below, the objection cannot be raised on appeal.

If the effect of a lease, by itself considered, would be to merge or supersede a prior agreement between the parties thereto, parol evidence that it was the understanding, at the time the lease was executed, that the prior agreement should be kept on foot and remain a subsisting contract, is inadmissible, as varying by parol the effect of the lease, and changing the rights of the parties under it.

The omission, by a lessor, to make repairs according to his agreement, will not release the lessee from the payment of rent. The remedy of the lessee, in such a case, is by action against the lessor, upon the covenant to repair.

APPEAL from a judgment of the Wayne county court, affirming a judgment of a justice of the peace. The plaintiff brought his action, before the justice, to recover from the defendants

$100, being two quarters' rent due on a lease executed by the plaintiff and the defendant Percy, dated May 26, 1854, by which the plaintiff leased to the said Percy certain premises therein described, for the term of five years from the 30th day of June then next, and by which also Percy covenanted to pay the plaintiff $200 a year rent for said premises during the said five years, to be paid quarterly on the 15th days of September, December, March and June in each year. The lease was executed under the hands and seals of the plaintiff and the defendant Percy. Annexed to this lease was another instrument under the hand and seal of the defendant L'Amoraux, which was in the words and figures following, viz: "In consideration of one dollar to me in hand paid by Charles A. Tibbits, the receipt whereof is hereby acknowledged, I hereby guaranty that Herman Percy shall punctually pay, to the said Tibbits the rents which he has obligated himself to pay in the annexed lease, and punctually, at the time he has agreed to pay the same; and in case he shall neglect or refuse to pay the same as they shall become due by the terms of said annexed lease, I promise, for value received, to pay the same to said Tibbits on demand, without notice of non-payment by the said Percy. Witness my hand and seal this 26th day of May, 1854.

D. W. L'Amoraux. [L. S."]

The action before the justice was commenced on the 26th day of January, 1855, and tried on the 23d day of March following. On the trial, after the plaintiff had given evidence tending to prove the execution of the lease and the guaranty, he rested his proofs; whereupon the defendants moved for a nonsuit, but without specifying any ground for such motion; which motion was denied by the justice. The defendants then gave in evidence an instrument in writing executed by the plaintiff under his hand and seal, which was in the words and figures following: "This is to certify that I, C. A. Tibbits, have this 22d day of May, 1854, let and rented unto Heman Percy, of the same place, my house and premises, known as the frame building near the rail road depot in the town of Arcadia, bounded on the west by the plank road, south by the old Monte-

zuma turnpike, north and east by the lands owned by E. T. Grant and Socrates Smith, with the appurtenances and the sole and uninterrupted use and occupation thereof, for the term of five years, to commence on the fifteenth of June next, at the yearly rent of two hundred dollars a year, payable quarterly and I am to make as soon as possible the following repairs and additions to the premises. I am to build on said premises a barn twenty-five feet by thirty; to be well finished. I am to build a stoop on the west side of the house; bring good water in logs or pipes to the said premises in a good workmanlike manner; repair the fences now on the premises, and build, in the course of this summer or next fall, a good picket fence on the south line of said premises; and I hereby give him, the said Percy, the privilege, if he sees fit, to finish off a room in the basement, to be used as a recess or other purpose. Given under my hand, 22d day of May, 1854.

CHAS. A. TIBBITS. [L. S."]

The premises described in this instrument were the same as those described in the lease. The defendants then offered to prove a breach of the agreements on the part of the plaintiff in the agreement above set forth, which was objected to by the plaintiff, and the objection was sustained by the justice. The defendants also offered to prove that, at the time of the execution of the lease, it was understood by and between the parties that the contract of the 22d of May, 1854, should remain valid and in force. This was objected to on the part of the plaintiff, and the justice sustained the objection. The parties then rested, and the justice rendered judgment in favor of the plaintiff, against both the defendants, for $100 damages, together with costs. The defendants appealed to the county court, where the judgment of the justice was affirmed.

S. K. Williams, for the appellants.

F. E. Cornwell, for the respondent.

By the Court, WELLES, J. The objection of misjoinder of defendants, if it had been interposed in proper time and man-

ner, would have been fatal to the plaintiff's recovery against both defendants in one action. The contract of each defendant was, substantially, to secure the same object, to wit, the payment of the rent; but their undertaking was several and not joint. The obligation of Percy, the principal, was primary and absolute; that of L'Amoraux was secondary and conditional. Their obligations to the plaintiff were the same, and their liability to an action would arise at the same moment, and to the same extent precisely; still, it was not a joint undertaking. (*De Ridder* v. *Schermerhorn and Purdy*, 10 *Barb.* 638. *Hall* v. *Farmer*, 5 *Denio*, 484; *affirmed on appeal*, 2 *Comst.* 553.) These cases may be regarded as overruling the case of *Luqueer* v. *Prosser*, (1 *Hill*, 256,) and others of like import. Section 120 of the code, cited and relied upon by the respondent's counsel, does not help him. That section provides for including in the same action, persons severally liable upon the same obligation or instrument—not upon different instruments, as in this case.

It is contended, however, by the respondent's counsel, and it seems to me with unanswerable force, that this objection, not appearing to have been taken and pointed out by the defendants on their motion for a nonsuit, should not now be listened to. The return of the justice states that when the plaintiff rested the defendant moved for a nonsuit, which was denied. No ground whatever was stated for the motion. Neither the justice nor the plaintiff had his attention directed to the question of misjoinder. If it had been done the motion might have been granted, or the plaintiff might have discontinued; or, perhaps, would have been entitled to elect against which of the defendants he would proceed. It should now be regarded the same as if a motion for a nonsuit had not been made. The point is strictly a legal, not to say a technical one. No injustice has been done, as the cause of action against both defendants was fully made out.

The only remaining question arises upon the exclusion, by the justice, of evidence offered by the defendants of the plaintiff's failure to fulfill his covenants contained in the agreement

of May 22d, 1854. The justice excluded the evidence on the ground that the agreement was superseded by the lease, which bore date the 26th of the same month. The defendants offered to prove that at the time the lease or contract of May 26th, 1854, was made, it was understood between the parties that the first contract should remain valid and subsisting. This was objected to, and the objection sustained. If the effect of the lease or contract of May 26th, aside from the agreement sought to be proved, in relation to keeping on foot the agreement of the 22d of May, would have been to merge or supersede the latter, parol evidence of such fact, that is, the fact that it was to remain a subsisting agreement, was, I think, inadmissible, as varying by parol the effect of the lease, and changing the rights of the parties under it; and the question must be decided irrespective of such offer and rejection. In my opinion, the lease or second contract did not supersede the agreement before entered into by the plaintiff to make repairs, &c. They were not inconsistent with each other, and there was no conflict whatever between them. And there is nothing in the lease, in terms or by implication, superseding the plaintiff's agreement to make repairs. But it does not release the defendants from paying the rent. The remedy of the lessee, in such case, is by action against the lessor upon the covenant to repair, &c. (*Watts* v. *Coffin*, 11 *John.* 495. *Osborn* v. *Etheridge*, 13 *Wend.* 339. *Christopher* v. *Austin*, 1 *Kern.* 216.) The cases cited by the appellants' counsel, go to show that where the lessor has evicted the lessee, or prevented him from entering upon the demised premises, or any part of them, he shall not recover rent.

The judgment of the county court should be affirmed.

Ordered accordingly.

[Monroe General Term, March 2, 1857. *T. R. Strong*, *Welles* and *Smith*, Justices.]

24 44
32 379
50h 144
29a 217
43k 161
55a 555

SMILES *vs.* HASTINGS and SIBLEY.

Where the heirs at law of a person dying seised of a tract of land, which descended to them as tenants in common, caused the same to be subdivided into nine lots, and a map of such subdivision to be made, by a surveyor, and partitioned the same among themselves, by mutual conveyances and releases of the lots, to each other, which mentioned and referred to the said map, on which a road was laid down as running through the center of the tract; and subsequently two of the heirs sold and conveyed their respective lots to purchasers, by deeds referring to the map and to the road so laid out upon it; *Held* that the map was part and parcel of the several conveyances, and that such conveyances were to be taken and deemed as subject to, and controlled by it. That the road being laid out, upon such map, and the lots bounded by it, each grantee was entitled to the enjoyment of the easement thus conveyed, and that he and his grantees could recover damages for its obstruction by the others, or by persons claiming under them.

Held also, that this right of way was a servitude to which each lot was equally subject, and was of the same character and force as if created by express grant. And that by virtue of the release and conveyance of a lot to either of the heirs, by its number, on the making of the partition, the grantee became entitled, as part of the grant, to a right of way over the road laid down on the map, as an easement; which, being appurtenant to the land, passed to the grantees of such heir.

Held further, that in case either of the lots in the subdivision was so situated that there was no access to it by any public road or any other means, without passing over the lands of other persons, a right of way passed to the grantee, over the land of his grantors, as a way of necessity, incidental to the grant, and without which the grant would be useless. And that such right, being appurtenant to the land, would pass to persons deriving title from the original grantee.

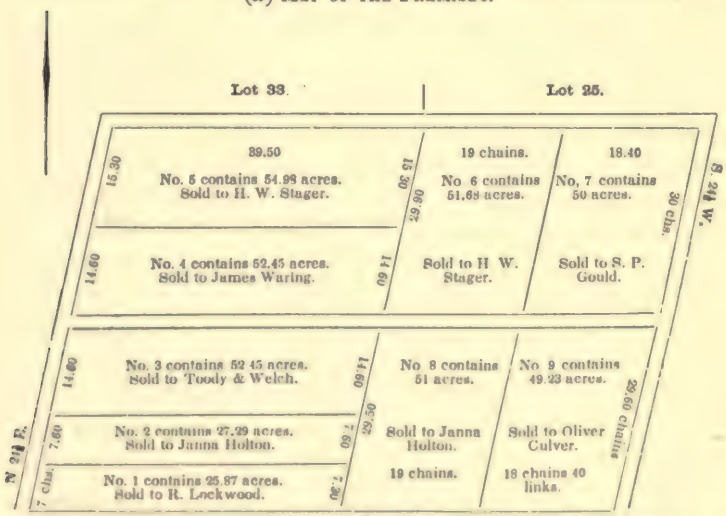
An easement acquired by deed can never be lost by non-user. To be thus lost, it must have been acquired by use.

In an action for obstructing a right of way, the plaintiff is not to be limited to the recovery of nominal damages.

MOTION by the plaintiff for a new trial, or judgment on a verdict in his favor, taken subject to the opinion of the court, for six cents damages. The case discloses the following facts: Upon the death of John Atkinson, sen., prior to the year 1828, the title in fee to the whole of the two large lots, numbers 33 and 25, of the second division lots in township No. 13, in the 7th range of townships, now in the town of Irondequoit,

in the county of Monroe, descended to his heirs at law, as tenants in common, who, in October, 1828, caused the whole tract, consisting of the said two lots 33 and 25, and containing over 400 acres of land, to be subdivided into nine smaller lots, numbered from one to nine inclusive, by Valentine Gill, and a map of said subdivision to be made by said Gill. This map shows clearly and distinctly the size, shape, situation and location of each of the lots, as well the two original large lots—numbers 33 and 25—as the nine small lots made by the subdivision, and the boundary lines, with their courses and distances, of each.(*a*) The map represents the whole tract, consisting of the two original lots, 33 and 25, as being in the shape of a *rhombus*, with its N. E. and S. W. corners forming equal acute, and the S. E. and N. W. corners equal obtuse angles, and surrounded on the east, west and north sides by a road or roads, and with an east and west road running through the center of the tract, from the road on the west to that on the east side of the tract, and nearly equi-distant from the north and south lines thereof. Each of the nine small lots is

(*a*) Map of the Premises.



Lot 33 contains 213 acres, and lot 25 contains 205 acres, by a scale on the original map of three chains to the inch. The above is very much contracted from the surveyor's diagram.

also in the shape of a *rhombus*. Number 9 contains $49\frac{23}{100}$ acres, and lies in the southeast corner of the tract, extending north to the east and west road through the center of the tract, as represented on the map; its north and south lines being 18 chains and 40 links, and its east and west lines being 29 chains and 60 links in length. No. 8 contains 57 acres and adjoins No. 9 on the west, and also extends north to the said east and west road; its length, north and south, being the same as No. 9, and its north and south lines being 19 chains in length. No. 3 contains $52\frac{45}{100}$ acres, and extends from the road on the west side of the tract to No. 8, which bounds it on the east; its east and west lines are 14 chains and 60 links, and extends north to the east and west road, through the center of the tract. Lot No. 4 is of the same size and shape, and contains the same number of acres as No. 3, and lies directly north of it, the said east and west road, as laid down on the map, running between them.

After the said subdivision of this tract of land, and prior to the first day of December, 1828, the children and heirs at law of the said John Atkinson, deceased, made partition thereof, and on such partition conveyed and released to William Atkinson, one of said heirs, lot No. 8 in the said subdivision; and on the 8th day of December aforesaid the said William Atkinson conveyed the same lot No. 8 to Janna Holton, describing the same by metes and bounds, as subdivision No. 8, in which description the east line is mentioned as running from the southwest corner, north, &c. on the west line of the lot, 29 chains and 50 links, to the center of a contemplated road to run east and west; thence east 19 chains; thence south, &c. 29 chains and 50 links, to the south line thereof; thence east 19 chains, to the place of beginning; reference being made to a map by Valentine Gill, of said great lots 33 and 25.

The plaintiff derives title by sundry mesne conveyances from Janna Holton, to the east 30 acres of lot No. 8.

On the 10th of March, 1830, Eliza S. Atkinson, another of the said children and heirs at law, conveyed said lot No. 3 to Nicholas Toody and James Welch by deed, in which the lot

is particularly described, as being known as subdivision No. 3, and in which the north line is described as running on the division line between subdivisions three and four; *and reserving the right of a road two rods in width on the division line between subdivisions three and four*, containing, &c.

The defendants derive their title to said lot No. 3 by sundry mesne conveyances from Toody and Welch. In all the conveyances, including that to the defendants, the same reservation in respect to the road is made.

On the 22d of November, 1830, the said Eliza S. Atkinson conveyed to James Waring lot No. 4, as *being known and distinguished on a map made by V. Gill, as subdivision No.* 4 *in said lot No.* 33, and then describing it by courses and distances. Soon after the said deed to Toody and Welch, they entered into the possession of lot No. 3, and enclosed and occupied the strip of land laid down on the map as a road between lots three and four. The possession and occupancy of the land they conveyed had been continued to the time of the commencement of this suit. At the time of the deed to Toody and Welch, and down to the time of the purchase by the plaintiff, which was in the year 1849, lot No. 8 was unoccupied, and was wild and uncultivated. The plaintiff took possession of 30 acres, owned by him, in the year 1851, and required the defendant to open, or suffer to be opened, the road as laid down on the map, or a road two rods wide, from the highway running upon the west side of the whole tract, to the said lot No. 8, owned by the plaintiff, and the defendants refused such request.

The case further states that the road, as laid out upon the map, was intended to be four rods wide, and that no part of it has ever been opened. The plaintiff's counsel then offered evidence to prove that he had sustained damages by reason of the obstruction of the way in question by the defendants. The defendants' counsel objected to the giving of any evidence on that point, and the judge sustained the objection, and decided that the plaintiff was only entitled to nominal damages, to which the plaintiff's counsel excepted. The judge then

directed a verdict to be taken for the plaintiff, with six cents damages, subject to the opinion of the supreme court, upon a case to be made by the plaintiff.

S. Mathews, for the plaintiff.

M. S. Newton and *O. Hastings*, for the defendants.

By the Court, WELLES, J. The subdivision, map and partition of this whole tract, consisting of the original lots numbers 33 and 25, were the acts of all the heirs at law of John Atkinson, sen., deceased, and they and their grantees are bound by those acts. The map was, in fact, part and parcel of the several conveyances mentioned in the case, as they all, either by express words or unavoidable implication, refer to and recognize it; and it is impossible to locate the lands described in them without resort to it. It exhibits the road in question as plainly and distinctly as it shows any thing else. The conveyances of lots No. 8 and No. 3, by William and Eliza S. Atkinson, through which the parties respectively derive their titles, must be taken and deemed as subject to, and controlled by, the map. These lots, Nos. 8 and 3, are bounded on the north by this road, and the owners of neither of them is at liberty to refuse to the other the enjoyment of the easement contemplated by the parties to the subdivision and partition of the whole tract. It is a servitude to which each is equally subject, and is of the same character and force as if created by express grant.

By virtue of the release and conveyance to William Atkinson, of lot No. 8 by its number, on the partition between the proprietors, he became entitled, as part of the grant, to a right of way over the road laid down on the map, as an easement, which, being appurtenant to the land, passed to the plaintiff by virtue of the conveyances through which he derives title to his part of the lot.

Under the circumstances of this case, a right of way passed by the conveyance to William Atkinson, over the land of his

grantors, as a way of necessity, incidental to the grant, and without which the grant would be useless. The situation of lot No. 8 upon the map shows that there was no access to it by any public road, or any other means, without passing over the lands of other persons. The authorities referred to by the plaintiff's counsel on this point, and many others, clearly establish this proposition. (*G. & Whately on Easements*, 54 *to* 57. 3 *Kent's Com.* 419 *to* 433. *Shep. Touch.* 89. *Holmes* v. *Seely*, 19 *Wend.* 507.) And this right, being appurtenant to the land, passed to the plaintiff. Where a right of way is thus implied from the necessity of the case, its particular locality is to be determined and assigned by the grantor in a reasonable place and manner; and if he declines, the grantee will be permitted to make the selection. In this case, the way or road laid down on the map may be reasonably regarded as settling before hand, by all the owners of the whole tract, the place where the right should be enjoyed. The case shows that Elizabeth S. Atkinson, one of the tenants in common, and under whom the defendants claim, recognized and reserved this right in the particular place claimed, in her deed to Toody and Welsh; and the same reservation and recognition was preserved in all the conveyances through which the defendants derive their title from her. This, however, cannot benefit the plaintiff *as a reservation*, but it shows the defendants knew of, and took their title subject to, this right of way.

This right of way has not been lost by non-user or adverse possession. It was acquired by force of the deed from the proprietors to William Atkinson. An easement acquired by deed can never be lost by non-user. To be thus lost, it must have been acquired by use. The doctrine of extinction by disuse, does not apply to servitudes or easements created by deed. In the one case the mere disuse is sufficient; but in the other, there must not only be disuse by the owner of the land dominant, but there must be an actual *adverse user* by the owner of the land servient. See *Angell on Water Courses, ed. of* 1850, *p.* 269, § 252, the language of which, nearly, I have appropriated. See also *Arnold* v. *Stevens*, (24 *Pick.* 106;

and *White* v. *Crawford*, (10 *Mass. Rep.* 189.) And there was no adverse possession because, 1. The plaintiff and those under whom he claimed had no occasion to assert or use his right until he took actual possession of his land. (*Arnold* v. *Stevens, supra. Doe* v. *Butler*, 3 *Wend.* 149.)

We are of the opinion, therefore, that the plaintiff established his right to the easement claimed; and as the defendants refused to open the road, or to allow it to be opened, they are liable in damages therefor to the plaintiff.

It seem to us, also, that the justice before whom the action was tried, should not have limited the plaintiff to nominal damages. The plaintiff offered to prove that he had sustained damages by reason of the obstruction of the way in question by the defendants, which the justice refused; and held, as matter of law, that the plaintiff was entitled only to nominal damages. We are to intend that the evidence offered by the plaintiff was legal evidence of damages, and there appears no sufficient reason why it was excluded. That there was a portion of lot No. 8 which the plaintiff did not own, is not a sufficient reason. It does not appear that the owner of that portion would have objected to the opening of the way adjacent to his land, and it might have been that it was more convenient for the plaintiff to commence opening the road from the west end. Again, it would be of no use to the plaintiff to open the road east of the defendants' land, so long as they refused to allow him to open it along the north end of theirs.

We think, therefore, that the plaintiff is entitled, either to judgment in his favor on the verdict, with costs, or to a new trial, with costs to abide the event, at his election.

Ordered accordingly.

[Monroe General Term, March 2, 1857. *T. R. Strong*, *Welles* and *Smith*, Justices.]

Lynch *vs.* Tibbits and Miller.

Where the defendants, who held a chattel mortgage, prior in date to any other, upon a horse owned by the plaintiff, at the request of the plaintiff and for his accommodation, gave him a certificate stating that such mortgage was canceled, at the same time taking from the plaintiff in exchange therefor a mortgage upon other property, for the amount secured by the first mortgage; the plaintiff concealing from the defendants the fact that the property embraced in the second mortgage was already mortgaged to O., a third person, to its full value by a mortgage not then filed in the clerk's office; but such mortgage was afterwards filed, before the defendants could get their substituted mortgage on file; *it was held* that the defendants, on discovering the existence of the mortgage to O. and that it had been made a prior lien to theirs, could repudiate the cancellation of the original mortgage, on the ground of its having been procured by fraud, and take possession of the mortgaged property, by virtue of such mortgage.

APPEAL from a judgment entered upon the report of a referee. The action was brought to recover the possession of a horse, and damages for the detention. The cause was referred to a referee, and tried before him. He reported in favor of the defendants, and judgment was entered in accordance with such report. The facts are sufficiently stated in the opinion which follows.

Jas. R. Cox, for the appellants

Geo. O. Rathbun, for the respondent.

By the Court, Welles, J. On the trial before the referee, the following facts appeared: On and prior to the month of June, 1855, the plaintiff was the owner of a certain bay horse, upon which the defendants held a chattel mortgage, dated December 14, 1854, and which was duly filed on the 7th day of February, 1855, in the clerk's office of the county of Cayuga. On the 14th of June, 1855, the defendants, at the request of the plaintiff, took from him a chattel mortgage upon certain other property belonging to the plaintiff, for the debt secured by the first mortgage, and at the same time gave him a certificate stating that the first mortgage was canceled. This change of security was made to enable the plaintiff to mortgage the bay horse as security for the purchase money of another horse,

which he was about purchasing, to work with the bay one. Previous to this, and on the 12th of June, 1855, the plaintiff had given a chattel mortgage to one O'Connor, covering the same property as that mentioned in the mortgage given by the plaintiff to the defendants on the 14th of June, 1855, also including the said bay horse; which mortgage was not filed in the proper clerk's office until after giving the second mortgage to the defendants. The first intimation the defendants had of the existence of the mortgage to O'Connor, was on the 14th of June, 1855, when Miller, one of the defendants, went to the county clerk's office with the last mentioned mortgage, for the purpose of filing it, when he discovered the mortgage to O'Connor, which had been filed a few minutes before he arrived there. It was the understanding between the plaintiff and defendants, when the mortgage of the 14th of June was given by the latter to the former and the certificate of cancellation of the mortgage of December 14, 1854, was given, that the mortgage of June 14, 1855, and the said certificate, were not to be of any force until the mortgage of December 14, 1854, on file in the clerk's office, was taken up, and that the defendant Miller and the plaintiff were to go to the clerk's office and there exchange the papers. They started together from the place where the last mortgage and the certificate of cancellation were executed, to go to the clerk's office for that purpose. Miller went, as before stated, but the plaintiff did not go there. The defendant Miller, on discovering the mortgage to O'Connor on file, refused to file the mortgage of June 14, 1855, or to exchange the papers; and repudiated the understanding as to the release and cancellation of the mortgage of December, 1854, by proceeding immediately with a certified copy of the latter mortgage to take the said bay horse from the possession of the plaintiff, which is the same taking and conversion stated in the complaint.

The referee, upon the foregoing facts, found as conclusions of law that the plaintiff by fraud induced the defendants to give the certificate of cancellation of the mortgage of December, 1854, and to take the mortgage of June 14, 1855, in lieu thereof, for the reason that at the execution of the latter mortgage the property

covered by the same was, to the knowledge of the plaintiff, embraced in the O'Connor mortgage, which was for the full value of the property embraced by it, and by reason of such fraud the defendants had the right to repudiate the cancellation of the mortgage of December, 1854, and did, under and by virtue thereof, rightfully take possession of the bay horse.

I incline to the opinion that the evidence justified the finding of the referee. I do not say that a mortgagor of personal property is always bound, at the peril of being charged with fraud, to disclose whether the property is incumbered. The mortgagee has means of ascertaining how the fact is. He may search the proper office, and thus protect himself against prior mortgages. He may also inquire of the mortgagor, and if he falsely asserts that none exists, it would properly be regarded, as between the parties, a strong badge of fraud. In the present case I think the conduct of the plaintiff was such as to draw upon himself the imputation of a design to mislead the defendants. The exchange of securities was at his request and for his benefit exclusively. When the last mortgage and the certificate of cancellation of the one of December, 1854, were given, it was agreed between the parties that those instruments should be of no validity until the first (that of December, 1854,) was taken up, and that the plaintiff and Miller, one of the defendants, should go together to the clerk's office and exchange the papers; by which, undoubtedly, was meant that they both should be at the clerk's office together, when they could see that all was right. Miller accordingly went, and the plaintiff, although he started in company with him, did not go there. Where he went does not appear; but it appears that a few minutes before Miller arrived at the office, O'Connor appeared and left his mortgage to be filed, and quitted the office abruptly and in haste. It seems to me the referee was at liberty to conclude, that when the plaintiff parted company with Miller, after they had started to go to the clerk's office, he went to O'Connor, who it appears from the evidence was near at hand, and gave him notice of what was going on, that he might hasten to the clerk's office and file his mortgage.

Whatever may be the strict rule of law in regard to the duty of the plaintiff to give the defendants notice of O'Connor's mortgage, good faith and fair dealing required him to do so The defendants were relinquishing a legal and valid lien upon property, which was prior to any other incumbrance, and taking other and different security for their debt, upon property already incumbered to the full amount of its value, and this known to the plaintiff, and of which he knew the defendants were ignorant; and all this, at the request and for the exclusive accommodation of the plaintiff. In view of all the evidence in this case, I am satisfied the plaintiff intended to perpetrate a fraud upon the defendants.

But it is alleged by the plaintiff's counsel that, before the defendants were at liberty to disavow and repudiate the change or substitution of the securities, they were bound to rescind the arrangement of the 14th of June, 1855; and it is contended that they have not done so. That in order to rescind the arrangement, they should, upon the discovery of the fraud, have immediately returned the last mortgage, which the case does not show they have done. It is a sufficient answer to this, that by the agreement of the parties, the new mortgage and the certificate of cancellation of the old one, was not to take effect until the plaintiff and the defendant Miller should meet at the clerk's office and exchange the papers. This has never been done, and it is through the neglect, if not for a reason less creditable to the plaintiff, that it has been omitted. When Miller discovered that O'Connor's mortgage had been filed, he refused to put the one to him and Tibbits on file. The arrangement between the plaintiff and defendants has never been consummated, and, by the agreement between them, it was to have no force until an event, which has never happened, should take place. Under such circumstances there was nothing to rescind.

The judgment should be affirmed.

Ordered accordingly.

[Monroe General Term, March 2, 1857. *T. R. Strong, Welles* and *Smith* Justices.]

DWIGHT *vs.* PEART.

The plaintiff in an action of ejectment will not be estopped from asserting his legal title, by the circumstance that, before such title was acquired, he executed to the defendant's remote grantor an agreement of indemnity against any damage he might sustain by reason of the covenants of warranty in a deed of the premises given by such remote grantor, under which deed the defendant entered and claimed. T. R. STRONG, J., dissented.

THIS was an appeal from an order made at a special term, overruling the demurrer of the plaintiff to the third answer of the defendant. The action was for the recovery of the possession of real property; the plaintiff claiming to own the same in fee. The plaintiff, in his complaint, stated his title to have been derived from Everard Peck, to whom the premises had been conveyed in trust by Maltby Strong. That Peck conveyed to the plaintiff on the 22d of November, 1853. The answer set up that after the giving of the deed by Strong to Peck, Strong conveyed the premises in question to Stephen Charles, and Charles conveyed to William W. Alcott, who conveyed with warranty to Frost & Wilbur. That the defendant claims title under Frost & Wilbur, through several mesne conveyances. The answer then stated, that in 1853 an action was pending in the supreme court, wherein Everard Peck was plaintiff, and Maltby Strong, Theodore W. Dwight, (the plaintiff in this action,) and William W. Alcott, were defendants; in which action the title to the property in the complaint mentioned, with other real estate, was in question, and the title of Peck thereto controverted by Alcott. That that action was settled between the parties thereto, upon which settlement the plaintiffs executed to Alcott an instrument, by which they covenanted and agreed that the said Theodore W. Dwight should and would well and truly indemnify and save harmless the said William W. Alcott, his heirs, executors, administrators and assigns, from all loss or injury, costs and damages, which to him or them might arise by reason of a failure of certain covenants of warranty contained in a deed executed by said W. W. Alcott to Joseph A. Frost and Clark Wilbur, dated April 11 1846, and

in a certain other deed executed by said Wm. W. Alcott to Jacob Anderson, dated December 14, 1849. And that the said Theodore W. Dwight should and would save, defend, keep harmless and indemnify the said William W. Alcott, his executors, administrators and assigns, from and against all actions, costs, damages, claims and demands whatever, to be incurred or sustained by the said Alcott, his executors, administrators or assigns, for or by reason of or on account of the non-performance of the covenants contained in said deeds by him executed, or either of them.

The defendant then insisted that the plaintiff was estopped, by his covenant contained in this agreement, from denying the defendant's title under the conveyances mentioned in the answer; and he prayed that the plaintiff might be perpetually enjoined from the prosecution of this or any other action to recover the possession of the premises. The plaintiff demurred to the latter part of this answer.

S. Mathews, for the appellants.

J. H. Martindale, for the respondent.

E. Darwin Smith, J. The plaintiff claims to be the owner in fee simple of the premises for which he has brought his ejectment. The defendant is confessedly in possession without title, having gone into possession under a claim of title which we are to assume is spurious, derived through several mense conveyances from Wm. W. Alcott, who conveyed with warranty. The defendant now, in his answer, to which the plaintiff has demurred, and upon which we are called to pass, without setting up any title in himself, claims that the plaintiff is estopped from asserting his legal title, because, before such title was acquired, he executed to Alcott, the defendant's remote grantor, an agreement of indemnity against any damage he might sustain by reason of the covenants of warranty in his deed of the premises under which the defendant entered and claimed. The point presented in the answer is simply whether

the execution of such instrument of indemnity is a good estoppel in behalf of the defendant; and this is the only question presented on this demurrer. That it is not such an estoppel, seems to me very clear, upon authority.

An estoppel by *deed* can only be set up by the parties and privies. (*Coke Litt.* 352. 3 *John. Cases*, 101. 17 *Mass. Rep.* 432. 2 *N. Hamp. Rep.* 67. 9 *Wend.* 209. 4 *Denio*, 482.) There is no privity of estate or contract between the plaintiff and the defendant; and nothing in the case upon which to base an *estoppel in pais*. (8 *Wend.* 480. 3 *Hill*, 215.) An express warranty of title, but nothing short of that, will estop a grantor from setting up title against his own grantee. (1 *Shep.* 216, 281. 24 *Pick.* 324. 1 *Barb.* 623.) The plaintiff has never granted the premises to the defendant, or any grantor of his, and therefore this rule of law will not help out his claim of an estoppel. The plaintiff's contract is merely personal and executory, and does not relate to the land, and is only available to Alcott after a breach. (15 *Mass. Rep.* 106.) The answer clearly sets up no matter of estoppel by deed or *in pais*, and the demurrer to it in that respect is well taken. But aside from questions of estoppel in deed, or *in pais*, my brother STRONG has sustained this answer, or held at special term that it sets up a defense "upon the principle of estoppel to prevent circuity of action." And he refers to *Brown* v. *Williams*, (4 *Wend.* 360;) *Clark* v. *Bush*, (3 *Cowen*, 151;) *Jackson* v. *Root*, (18 *John.* 60.) The first of these cases was an action of assumpsit by a second indorser, to recover back money paid under a judgment against such indorser where the holder had received payment from a prior indorser, and covenanted not to sue him, and to indemnify him against any suit on the note. The court held that each indorser stood in the light of a principal debtor to the subsequent indorsers, and that payment by, or a release of, a prior indorser was a discharge of the debt, and necessarily released the subsequent indorsers as sureties. The court also held that a covenant not to sue an individual debtor who is solely liable, has the effect of a *release*, and that it might be pleaded in bar, to avoid circuity of action, as is

well settled law. (2 *Salk.* 575. 2 *Bos. & Pul.* 62.) The case in 3 *Cowen*, 151, was the case of a bond to indemnify a single debtor against the payment of a note signed by him, &c.; *held* that the indemnity operated as a *release*, to avoid circuity of action. The case in 18 *John.* was where a grantor in a deed of conveyance was *released* by his grantee to make him a witness, and the court held that the release discharged also subsequent grantors of the same premises under the same title. All these cases are cases of release to avoid circuity of action, and they fairly illustrate all that class of cases where the court gives *present effect* to covenants and agreements as a defense, to avoid circuity of action and prevent a multiplicity of suits. But it seems to me they have no analogy to the present case. This action is brought to recover specific real estate; it is a proceeding *in rem*, and to recover damages for the unlawful withholding of the same. The recovery by the defendant of Alcott, or of any other intermediate grantor, upon their respective covenants of warranty, would be a mere recovery of damages. Such recovery of Alcott would be limited to the consideration paid him on the conveyance by him, with six years' interest and costs. When an agreement not to sue a bond of indemnity against a surety has been held to operate as a release, to avoid circuity of action, it has been because the defendant in the first suit, after payment, could commence a suit and recover back the identical amount paid. And this is the whole of the principle. Here nothing of the kind could happen. The defendant has and can have no action against the plaintiff on his bond of indemnity to Alcott. Alcott himself could not sue on it until a recovery had been had against him on his covenant of warranty, and satisfaction obtained upon such recovery.

It may be that Alcott, knowing that he had no title, or at best a doubtful one, sold the premises occupied by the defendant, for a song—for a trifling consideration compared with their actual value. There is no common measure of recovery in the two cases. I should presume from the agreement between the plaintiff and Alcott, that the plaintiff was unwilling to relin-

quish his claim to the premises in controversy, and that Alcott so understood the agreement, and only asked to be indemnified against personal loss on his covenant of warranty; for the plaintiff expressly agreed to confirm the title to the Anderson lot in the same connection with the agreement to indemnify said Alcott against loss and injury arising from his covenant of warranty on the sale of the Frost & Wilbur lot, which is the lot for the recovery of which this suit is brought. This bond of indemnity to Alcott cannot operate as a release of the land to the defendant, or to his grantee, for another reason. The plaintiff then had no title to the land. He acquired his title, as he states in his complaint, more than a month afterwards. A release only operates upon an existing interest, and does not pass a right subsequently acquired. (4 *Mass. Rep.* 688. 4 *Pick.* 365. 7 *Mass. Rep.* 153. 15 *id.* 106.)

A deed of release contains no warranty, and works no estoppel. (7 *Conn. Rep.* 250. 13 *Pick.* 116.) I am unable to see the least defense in the part of the answer covered by this demurrer, and think the decision of the special term should be reversed.

WELLES, J., concurred.

T. R. STRONG, J., dissented.

Judgment reversed.

[MONROE GENERAL TERM, March 2, 1857. *T. R. Strong*, *Welles* and *Smith*, Justices.]

24 60
29 352
32 356
13b 207
43k 149
72a 520

CORNELIUS R. DISOSWAY, administrator &c., *appellant, vs.* THE BANK OF WASHINGTON, *respondent.*

The statute, which recognizes the right of a creditor to call for an account by an executor or administrator, and gives to the surrogate the power to decree the payment of a debt, or any part of it, is to be understood as applying to *undisputed* debts, only.

The statute nowhere, in express terms, confers upon the surrogate the power to adjudicate upon the existence, validity or amount of a debt claimed against the estate of a decedent, upon a final settlement, where the debt claimed is disputed by the executor or administrator. And a surrogate should not assume the exercise of such power by inference or implication.

The legislature intended that jurisdiction over those questions should remain exclusively in the courts of common law and equity, where it appropriately belongs.

APPEAL from a decree of the surrogate of Livingston county made on a final settlement of an administrator's account. On the 7th day of November, 1812, Charles Carroll and Daniel Carroll, then of the city of Washington, executed and delivered to Charles Carroll of Carrollton, of the city of Annapolis in the state of Maryland, their joint and several bond in the penalty of $11,266.88, conditioned for the payment of $5,633.44, with interest. The obligor, Charles Carroll, afterwards removed to the county of Livingston in the state of New York, where he died prior to the year 1839, but the case does not state the time of his death. He is called in the papers, Charles Carroll of Bellevue. Some time after the execution and delivery of the bond, Charles Carroll of Carrollton, the obligee, died in the state of Maryland, leaving a will, in which Emily McTavish was appointed his executrix, to whom letters testamentary were issued, according to the laws of Maryland It does not appear when the obligee died, excepting that Mrs. McTavish was acting as his executrix some time prior to November 11, 1839. In that year, Mr. Disosway, the appellant, being an attorney and counselor at law, &c., residing in the city of New York, was employed on behalf of Mrs. McTavish to collect the moneys due on said bond, against the estate of Charles Carroll of Bellevue. In order to institute proceedings in the courts of this state, against the estate of the deceased obligor, an admin-

istrator upon the estate of Charles Carroll of Carrollton had to be appointed here. Accordingly, the appellant, on his own application, and with the concurrence of Mrs. McTavish, was, on the 11th day of November, 1839, duly appointed by the surrogate of the said county of Livingston, administrator, with the will annexed, of the said Charles Carroll of Carrollton, and soon afterwards commenced an action in his own name as such administrator in the late court of chancery, against Charles H. Carroll, the executor of the will of Charles Carroll of Bellevue, to recover the moneys secured by said bond. The defendant in that action appeared and put in an answer, proofs were taken and other proceedings had, until the cause was brought to a final hearing in the present supreme court at a general term of the 7th district, held at Auburn, in the year 1850, upon which the complainant's bill was dismissed by the judgment of the court. On appeal from that decision, the judgment of the supreme court was reversed by the court of appeals, and judgment ordered for the complainant for the amount claimed, with costs in the supreme court and court of chancery. The suit was commenced in the court of chancery by Mr. Disosway in his own name as solicitor in person, and he acted in the suit as his own solicitor, until it was decided against him by the supreme court. After that, and upon the appeal, and until the decree was finally satisfied, Mr. Henry R. Selden appeared and acted as attorney and counsel for the appellant, Disosway, in the court of appeals, and as such, received the amount of the decree, and distributed and paid out the same as hereinafter mentioned.

In the year 1842, and while the action of Disosway, administrator, &c. against Carroll, executor, &c., was pending in the court of chancery, the bond upon which the action was brought, was assigned by Mrs. McTavish to the Bank of Washington, a foreign corporation located in the city of Washington; after which, the correspondence of Disosway on the subject, was with the president and other agents of the bank. The suit was carried on by and in the name of Disosway, administrator, &c., after the assignment, for the benefit, and at the expense, of the bank. There was no evidence of any indebted-

ness of the estate of Charles Carroll of Carrollton to the Bank of Washington. After the money came into the hands of Mr. Selden on the judgment, which amounted, including costs, to $13,161.84, he paid to the bank $11,181.13. He retained for his own services and disbursements, by consent of the bank, $579.89, and the balance, $1344.44, he paid over to Disosway, the plaintiff in the suit, which the latter claimed to retain for his own costs, fees, expenses and commissions. On the 5th day of December, 1853, the Bank of Washington, claiming to be a creditor of the estate of Charles Carroll of Carrollton, deceased, presented a petition to the surrogate of the county of Livingston, against the said Disosway, administrator as aforesaid, praying that he be required to render an account, &c., upon which he was cited by the surrogate to appear on the last Monday of January, 1854, to render an account, &c. On the day last mentioned, Disosway appeared and put in his answer to the petition. 1. Denying the corporate existence of the petitioner. 2. Denying that the Bank of Washington was a creditor of the estate of Charles Carroll of Carrollton, deceased; and 3. Denying that the petitioner had ever applied to him for an account of his proceedings, &c. The proceedings were then adjourned from time to time, until December, 1, 1854, when the parties appeared before the surrogate by their counsel, and evidence was given upon the issues made by the said petition and answer. No evidence was given tending to show that the Bank of Washington was a creditor of the estate of Charles Carroll of Carrollton. The surrogate thereupon, on the 2d of December, 1854, made an order, by which, after reciting the proceedings before him, it was ordered that Disosway render an account, &c. according to the provisions of the revised statutes, title 3, part 2, chap. 6, art. 3, §§ 59 and 60, &c., and appointing the 20th day of February, 1855, for the hearing and settlement of the account; and the further hearing was adjourned until that time. On the day last mentioned, Disosway presented a petition to the surrogate, praying a citation for a final settlement, &c., and such citation was accordingly issued returnable June 1, 1855. On that day Disosway appeared in person, and the Bank of Wash-

ington appeared by counsel; when the appearance by said bank was objected to, on the part of Disosway, on the grounds, 1st, that it did not appear that the Bank of Washington was a corporation; 2d, or that said bank was a creditor of the estate of Charles Carroll of Carrollton; and 3d, that it was not shown on what ground the bank claimed to be a creditor, or to what amount, or how it was interested, to entitle it to appear at the accounting. The counsel for the bank then offered and read in evidence the petition and answer, and the order of the surrogate made thereon, of December 2, 1854, and the decree in the case of Disosway, administrator, &c. *v.* Charles H. Carroll, executor, &c. before mentioned. The surrogate thereupon decided that by the order made by him on the 2d day of December, 1854, the right of the Bank of Washington to appear on the accounting and contest the same, were established, and overruled the objection. The proceedings then went on, and evidence was taken. The principal matter in dispute appears to have been the amount the present appellant was entitled to retain out of the money collected of Charles H. Carroll as executor of Charles Carroll of Bellevue, on the said bond. The surrogate made a final decree, in substance adjudging that there was in the hands of Disosway as administrator, &c. unaccounted for, after deducting all his just claims for costs, expenses and commissions, the sum of $700, which, with interest thereon from July 15, 1853, belonged to, and was ordered to be paid to the said Bank of Washington. From that decree this appeal was brought. All other facts necessary to be stated appear in the opinion of the court.

O. Hastings, for the appellant.

Jno. Pomeroy, for the respondent.

By the Court, WELLES, J. The order of the 2d of December, 1854, directing the appellant to render an account, &c., was not appealed from within thirty days, and cannot, therefore, be reviewed on this appeal, which was not taken until

after the lapse of thirty days from the time the order was made. (2 *R. S.* 610, §§ 105, 106 and 107. *Bronson* v. *Ward*, 3 *Paige*, 189.) Upon that order being made, the appellant petitioned the surrogate for a final settlement, in pursuance of 2 *R. S.* 93, § 60, &c., and proceedings were had accordingly for that purpose. Upon the hearing of the matters of that petition, one question raised and decided was, whether the respondent was entitled to appear and contest the account. The surrogate held, upon the strength of the order of the 2d of December, 1854, and without any new evidence of a right to appear, that the respondent was entitled to appear and contest the account. The order simply adjudged that the respondent was bound to render an account. It did not determine, either in express terms or by necessary implication, that the respondent was a creditor of the estate of Charles Carroll of Carrollton. But it followed, I think, as a necessary consequence, that the respondent had the right to appear and contest the account. The proceeding for an account was originally instituted upon the application of the respondent, who, although not a creditor of the estate of Charles Carroll of Carrollton, may be said to have had an interest in the result of the accounting. And even if, in strictness, the respondent was not entitled to appear and contest the account, the ruling of the surrogate, admitting it to do so, could not, of itself, be an error for which the final sentence or decree should be disturbed. It was at most a question of practice, which was under the control of the surrogate, and did not necessarily affect any material question in the case. There was no point made upon the argument of this appeal, upon the question of the corporate existence of the respondent. I think, therefore, upon the whole, that there was no error in the decision of the surrogate, in allowing the respondent to appear and contest the account. The important question, however, remains to be considered.

Assuming that the respondent, by reason of its relations to this demand, should, for the purposes of these proceedings, be regarded in the light of a creditor of the estate of Charles Carroll of Carrollton, the existence of any demand in its favor

upon the fund now in the hands of the appellant, and the extent or amount of such demand, if any existed, was denied by the appellant; and those were the questions principally litigated before the surrogate. There was no dispute in regard to the amount of money received by the appellant, nor as to the manner in which it had been disposed of by him, except in regard to $750 of it. This amount the appellant claims belongs to him, for services and disbursements in the suit in equity against the estate of Charles Carroll of Bellevue, and that he has a lien upon it for those services and disbursements, and a right to retain and apply it in satisfaction of such lien. If such claim is valid, the respondent either is not a creditor, or interested at all, or not to the extent of the amount in controversy. Upon this question, in my judgment, the surrogate had no jurisdiction to decide. Where the statute speaks of the rights of a creditor to call for an account, and gives the power to the surrogate to decree the payment of a debt, or any part of it, it must be understood to apply to *undisputed debts.* (*Wilson* v. *Baptist Ed. So. of N.* Y., 10 *Barb.* 308 *to* 316, *&c. Dayton's Surrogate, ed. of* 1855, *pp.* 507, 8, 9, *opinion of Ogden, surrogate, in the case of the estate of John Kent.*) I am aware that there has been a want of uniformity of decision upon this question, as will appear from Mr. Dayton's treatise referred to, where the learned author has collected and reviewed all the cases on the subject. (*Id.* 507 *to* 523.) The statute nowhere, in express terms, confers upon the surrogate the power to adjudicate upon the existence, validity or amount of a debt claimed against the estate of a testator or intestate, upon a final settlement, where the debt claimed is disputed by the executor or administrator; and a surrogate should not assume the exercise of such power by inference or implication. The legislature, I am satisfied, never contemplated that it should be done, but, on the contrary, intended the power to remain exclusively in the courts of common law and equity, where it appropriately belongs. To allow such jurisdiction would be to confer upon the surrogates' courts the power to hear and determine nearly all disputes and controversies aris

ing upon contracts of every description, with deceased parties, whose estates are in the hands of executors or administrators.

In ordinary cases of final settlements, the surrogate is directed, if it shall appear that any claim exists against the estate, which is not due, or upon which a suit is pending, to allow a sum sufficient to satisfy such claim, or the proportion to which it shall be entitled, to be retained for the purpose of being applied to the payment of such claim when due, or when recovered, or of being distributed according to law. (2 *R. S.* 96, § 74.) That the previous 71st section by which the surrogate is required to settle and determine all questions concerning any debt, claim, legacy, bequest or distributive share, &c., does not include the power to adjudicate a disputed claim, is shown in a manner satisfactory to me, in the opinion of Ogden, surrogate, to which I have referred. If it were otherwise, a surrogate might determine issues upon the genuineness of the signature to a note which was the evidence of a claim; of fraud and undue influence in the procurement of an obligation upon which the claim was founded; of the capacity of the testator or intestate at the time of the transaction upon which his estate is sought to be charged; of payment, of set off; of recoupment, and, indeed, nearly all the questions which arise in actions upon contracts in courts of record. Before such extensive common law powers can be exercised by surrogates, the legislature should manifest their intention to that effect in more unequivocal language than they have yet used, or, as I apprehend, they will soon use.

But the respondent in this case was not a creditor of the estate of Charles Carroll of Carrollton, so as to be entitled to a decree from the surrogate, even if the claim had not been disputed. It was in no sense a creditor of that estate. The estate of Charles Carroll of Bellevue was the respondent's debtor from the time of the assignment of the bond, until the judgment against the latter estate was satisfied; and after that, the appellant and respondent held a relation to each other, of attorney and client, or of trustee and *cestui que trust;* precisely in this view, like the assignee of a chose in action not

negotiable, before the code, and the attorney who prosecutes it in the name of the original creditor, and receives the money. It is, indeed that very case in substance, only differing from it in the circumstance that, in the present case, the original creditor was dead, and the attorney was obliged to get an administrator appointed before he could proceed with the prosecution. The fact that he was himself appointed the administrator, makes no difference. His administration was *ancillary* to the original and general administration of the estate in Maryland, for this particular debt; and although, had there been other assets found in this state which would have been subject to the rules applicable to a general administration, the proceeds of this bond would not have been subject to such rules, but would have all gone to the respondent, subject to such just claims and liens upon it as might exist in favor of the appellant. It was the duty of the surrogate, when these facts appeared, to dismiss the proceedings before him, and leave the respondent to pursue such remedy as the law afforded him in the courts of record, which were ample to secure his rights, and those of all others connected with the transaction in question.

If the foregoing views are correct, the decree of the surrogate should be reversed, with costs of the appeal, and the proceedings be remitted, &c.

Ordered accordingly.

[Monroe General Term, March 2, 1857. *T. R. Strong, Welles* and *Smith*, Justices.]

24 68/
22a 114/

HODGES *vs.* W. S. & D. W. SHULER.

An instrument executed in the name of a rail road company, by its president and treasurer, by which such company, in four years from date, for value received, promised to pay, in Boston, to A. and B. or order, one thousand dollars, with interest thereon, "payable semi-annually, as per interest warrants hereto attached, as the same shall become due; or upon the surrender of this note, together with the interest warrants not due, to the treasurer, at any time until within six months of its maturity, he shall issue to the holder thereof ten shares in the capital stock in said company in exchange therefor, in which case interest shall be paid to the date to which a dividend of profits shall have been previously declared," &c.; was *held* to be a promissory note, negotiable, and the contract made by indorsing it, to be the usual contract of an indorser of negotiable paper.

Held also, that by the law of the state of Massachusetts, where the note was executed, and made payable, and where it was indorsed, the indorser, by his indorsement, made the same contract as the indorser of a promissory note makes in this state, viz: that if the drawer did not pay the note at maturity, he, the indorser, would pay it, in case the usual steps were taken to charge him.

Contracts are to be held to mean what the law of the place where they are made holds them to mean. For ascertaining the tenor, the interpretation, and the nature of a contract, the *lex loci contractus* governs; for deciding what *remedy* is applicable to the contract so interpreted, the *lex fori* governs.

A notice of protest, which gives the date, time of payment, amount, names of drawer, and payees, and the indorsement, of a promissory note, without stating its number, is sufficient, although it appears that at the time of the protest there were four other notes precisely like the one protested, in terms and amount, and distinguishable from that and from each other only by different numbers upon each; the *number* of a promissory note being no part of the instrument.

Where an instrument describes itself as being a promissory note, and on its face it purports to be *negotiable*, by being payable to A. and B. "or order," and the payees indorse it in blank, and thus pass it to the holder as a negotiable promissory note, they will be *estopped* from denying that it is such.

APPEAL from a judgment entered at a special term, after a trial at the circuit. The complaint alleged that on or about the 1st day of April, 1850, the defendants being partners in business, under the name of W. S. & D. W. Shuler, and being the payees mentioned in the promissory note hereinafter set forth, indorsed to said plaintiff said promissory note, of which the following is a copy, viz:

"Rutland & Burlington Rail Road Company.

No. 253. $1000.

Boston, April 1st, 1850.

In four years from date, for value received, the Rutland & Burlington Rail Road Company promises to pay, in Boston, to Messrs. W. S. & D. W. Shuler or order, one thousand dollars, with interest thereon, payable semi-annually, as per interest warrants hereto attached, as the same shall become due, or upon the surrender of this note, together with the interest warrants not due, to the treasurer, at any time until within six months of its maturity, he shall issue to the holder thereof, ten shares in the capital stock in said company, in exchange therefor, in which case interest shall be paid to the date to which a dividend of profits shall have been previously declared, the holder not being entitled to both interest and accruing profits during the same period. T. FOLLETT, President.

SAM HENSHAW, Treasurer."

That there was attached to said promissory note an unpaid interest warrant, which was so attached at the time of the indorsement of said note by the defendants, of which the following is a copy, viz:

"Interest Warrant, No. 8.

On the 1st day of April, 1854, the Rutland & Burlington Rail Road Company will pay the bearer, at the office of its treasurer in Boston, thirty dollars for interest on its note No. 253. SAM HENSHAW, Treasurer."

That at the maturity of said promissory note and said interest warrant, the same were duly presented for payment at the office of the treasurer of the said Rutland and Burlington Rail Road Company, in Boston, and payment thereof was duly demanded and refused, whereupon the same were duly protested for non-payment, and due notice thereof was given to said defendants; that said plaintiff was the lawful owner and holder of said note and said interest warrant; that there was due thereon and still unpaid, from said defendants to the plaintiff, the sum of $1030, and interest on the sum of $1000 from the 5th day of April, 1854, at the rate of six per cent per annum,

for which said sum of $1030, and interest as aforesaid on $1000 the plaintiff demanded judgment against said defendants, besides costs and expenses of protest.

The answer was a general denial of the matters set forth in the complaint.

The cause was tried at the Rensselaer circuit, in June, 1855, before Justice HARRIS. A trial by jury having been waived by the respective parties, the counsel for the plaintiff introduced and read in evidence the note and interest warrant mentioned and set forth in the complaint, which note was indorsed on the back thereof by the defendants, as follows: "W. S. & D. W. Shuler." The plaintiff's counsel then introduced and read in evidence a stipulation of the defendants, of which the following is a copy: "It is hereby stipulated, by the said defendants, that the facts hereinafter set forth are true, and that the said defendants will admit the same on the trial of the above entitled cause, subject to any exceptions that may be had and taken to the admissibility of the same or any part thereof, to be made by the defendants to the trial of the said cause. 1. That on the 4th day of April, 1854, Adolphus Bates, a notary public in and for the county of Suffolk, in the state of Massachusetts, at the request of the Bank of Commerce, located in the city of Boston, to which bank the plaintiff had sent for collection the promissory note mentioned in the complaint in this action, did present the said note at the office, in Boston, of the treasurer of the Rutland and Burlington Rail Road Company, the place of business in Boston of the said company, to the said treasurer, and there demand payment of the same of the said treasurer, which was refused; and thereupon did notify said defendants thereof, by depositing on the day aforesaid, in the post office in Boston, a written notice, of which the following is a copy, viz:

"City of Boston, April 4, 1854.

To Messrs. W. S. and D. W. Shuler.

Please take notice that a promissory note made by S. Henshaw, treasurer, for one thousand dollars, dated April 1st, 1850, payable in four years, in favor of yourselves and indorsed by

you, has been presented by me to the office of the treasurer and payment being duly demanded was refused; whereupon by direction of the holder, the same has been protested, and payment thereof is requested of you.

ADOLPHUS BATES, Notary Public."

And which notice was inclosed in an envelop, upon the outer side of which was the following direction: 'Messrs. W. S. and D. W. Shuler, Amsterdam, N. Y.' That on the said 4th day of April, 1854, and for ten years previous thereto, the said defendants resided in Amsterdam, in the state of New York; that said Amsterdam was the name of the post office at which said defendants then received their letters; that said notice was received by due course of mail, and that the post office mark thereon was 'Boston, April 5.' 2. That for some time immediately preceding the date of the said note, said defendants were engaged as contractors in building the road of the said rail road company, and on or about the date of said note received from the said company in satisfaction of their said contract and work, the said note, together with four other notes, each of the same date and amount and in every respect corresponding with said note, except that the numbers of all of said notes, marked thereon, were different, each from the other; that the transfer by said defendants of the note mentioned in said complaint was in the city of Boston and state of Massachusetts, and that each of said notes was transferred by said defendants shortly after the date of the said notes, in the same manner as the note in the complaint set forth; that Sam Henshaw (whose name is signed as treasurer to the note mentioned in said complaint) never signed as treasurer or otherwise, any note in which said defendants were named as payers, except the notes above mentioned. 3. That the original note, interest warrant and notice of protest, shall be produced and given in evidence on said trial by the party having possession of the same."

The original notice of demand and non-payment was then produced by the defendants, being as set out in the foregoing stipulation. The plaintiff's counsel also introduced in evidence,

a printed volume of the revised statutes of the state of Massachusetts, and the books of reports hereinafter referred to, of cases adjudged in the courts of Massachusetts, and so duly proved the same as to make them presumptive evidence of the statutes and common law of Massachusetts, as far as competent for that purpose; and said plaintiff's counsel read from said volumes of statutes, section 5 of chapter 33 therein, and from said books of reports, the following adjudged cases: (*Jones* v. *Fales*, 4 *Mass. Rep.* 245, *&c.*; *Joselyn* v. *Ames*, 3 *id.* 274; *Sawyer* v. *Stimpson*, 8 *id.* 260; *Smith* v. *Whitney*, 12 *id.* 5; *City Bank* v. *Cutter*, 3 *Pick.* 419; *Switzer* v. *French*, *&c.* 13 *Metc.* 262; *S. C.* 2 *Cush.* 310.)

The testimony being closed, the case was submitted to the judge upon written briefs. He subsequently decided that the plaintiff was entitled to judgment for the sum of $1148, besides costs. To which opinion and decision of the court, the defendants proposed and made the following exceptions: 1st. The court erred in deciding that the defendants were liable upon the instrument set forth in the complaint, by their indorsement. 2d. The court erred in deciding that the notice of demand and refusal to pay, served upon the defendants, was sufficient to charge the defendants as indorsers. 3d. The court erred in deciding that the plaintiff was entitled to recover in this action. 4th. The opinion and decision are contrary to law. 5th. The opinion and decision are contrary to the evidence in the cause. And from the judgment entered upon such decision the defendants appealed to the general term.

W. A. Beach, for the appellants. I. The instrument set forth in the pleadings and evidence, is not a negotiable promissory note, under the law merchant. It was not, therefore, transferable by mere indorsement and delivery. (1.) The acknowledged legal definition of a promissory note is, "*a written engagement by one person, to pay another person therein named, absolutely and unconditionally, a certain sum of money, at a time specified therein.*" (*Story on Promissory Notes* § 1.) It is seen that the promise must not only be absolute

but must be *for the payment of money only.* (*Jerome* v. *Whitney*, 7 *John.* 321. *Thomas* v. *Roosa, Id.* 461. *Atkinson* v. *Manks*, 1 *Cowen*, 691, 707. *Cook* v. *Satterlee*, 6 *id.* 108. *Clark* v. *King*, 2 *Mass. Rep.* 524. *Worden* v. *Dodge*, 4 *Denio*, 159. *Austin* v. *Burns*, 16 *Barb.* 643.) (2.) These authorities abundantly show the uniform rigor with which the requirement of an absolute money payment has been enforced. The case of *Austin* v. *Burns*, (*supra*,) decides, that if the instrument contains *stipulations to do other things in addition to the promise to pay money*, it is not a promissory note. The paper in the case at bar plainly falls within that principle. It is, however, objectionable within the above decisions, in that it contains no promise for the payment of money *absolutely.* It is in the alternative. It may be for money *or* stock, depending upon a contingency. (*Walrad* v. *Petrie*, 4 *Wend.* 575.) (3.) The rules governing bills of exchange and promissory notes, are *sui generis* and arbitrary. The necessities of commerce have invested them with peculiarities and privileges. But these are definite and fixed; and the law is sternly solicitous, to exclude all ambiguous instruments from these advantages. (4.) It is no answer to this objection that the contingency on which the payment of money is made to depend, is within the control of the payee. It is sufficient that the promise is not absolute and unconditional. The law has fixed its own definition of a promissory note. It has established certain and plain requisites. These cannot be relaxed to embrace others, which may be thought to fall within its policy.

II. This case does not come within the doctrine which under some circumstances holds an indorser of non-negotiable paper, liable as maker or guarantor. (*Dean* v. *Hall*, 17 *Wend.* 214. *Seabury* v. *Hungerford*, 2 *Hill*, 80. *Griswold* v. *Slocum*, 10 *Barb.* 402.) (1.) The paper here, is negotiable by its terms. It is payable to order. All the cases cited limit the doctrine they affirm to instruments non-negotiable by their terms. In *Seabury* v. *Hungerford*, (*supra*,) it was expressly held that an indorser of negotiable paper cannot be charged as maker or guarantor. (2.) If, however, the defendants may be held as

makers or guarantors, it can only be done by showing the original agreement out of which their liability arises. The plaintiff as naked holder of the note, without proving the agreement of transfer, cannot recover. No presumptions arise, as in case of a promissory note, from the possession of the paper. The indorsement here has no greater efficiency than if it appeared upon a contract to build a ship. (16 *Barb.* 643.) (3.) But the doctrine under consideration has application to no other instruments than promissory notes; and has never been otherwise advanced. There is no danger of failure of justice. Equity has full power to relieve. It is her peculiar jurisdiction. But the plaintiff must allege and prove more than if he held a valid note and indorsement, which by their own vitality created an obligation against the defendant. (4.) The question is one of *remedy*, not of *obligation*. And hence the Massachusetts decisions cited are of no significance. Parties appealing to the laws must conform to their requirement, no matter where their rights accrued.

III. It follows that no liability is shown against these defendants. The only evidence on the point is the undenied allegation in the pleadings, that the defendants indorsed the note to the plaintiffs, and its production, with their firm name on the back. That, *per se*, creates no obligation.

IV. Regarding the paper in suit as a promissory note, *stricti juris*, the defendants have not been regularly charged as indorsers. The notice of non-payment sent to them was imperfect. It appears that, at the time of the protest, there were four notes precisely alike in terms, and distinguishable only by different numbers upon each. And all of them were transferred by the defendants shortly after their date, in the same manner as the one in suit. The notice of protest makes no identification referring to either. (1.) The notice of dishonor must contain "a description of the note, so as to ascertain its identity." "There should be a sufficiently definite description of the note to enable the party to know to what one in particular the notice applies." (*Story on Promissory Notes*, §§ 348, 349.) (2.) Whenever the notice is insufficient, either upon its face, or

through evidence *aliunde*, it cannot be sustained without proof that the indorser was not misled. It must appear that the notice, with accessory facts, fully apprised him of the particular note to which the former applied. It is only by auxiliary evidence of this character that a notice has ever been upheld, when various notes are shown to which it might indiscriminately apply. (*Cayuga Co. Bank* v. *Warden*, 1 *Comst.* 413. *S. C.* 2 *Seld.* 19. *Beals* v. *Peck*, 12 *Barb.* 245. *Youngs* v. *Lee*, 2 *Kern.* 551.) (3.) The objections to this notice of dishonor, apparent upon the proof are, 1st. There were four notes, to either of which it might apply, without any designation of the one to which it was referable. 2d. It does not describe the note as that of the Rutland and Burlington Rail Road Company. 3d. It falsely describes it as made by "S. Henshaw, Treasurer." It was also executed by "T. Follet, President." The whole notice was calculated to mislead, as to the identity of the note intended. These objections are answered by no proof of circumstances, (as in the case of *Cayuga Co. Bank* v. *Warden*, (*supra*,) showing that, nevertheless, the defendants were not misled. The evidence that *Henshaw* never executed any but the four notes mentioned, in which the defendants were named as payees, is unsatisfactory, and affects only the last two objections. These notes were those of the *company*, not of the *treasurer*. They were so in law, and so treated. And were undoubtedly so remembered and described by the defendants. The fact that *Henshaw* signed no others, did not, therefore, relieve the uncertainty of this notice. Had it appeared that the *company* executed no others to which the defendants were parties, it might have obviated the two last specified defects in the notice. The precise point raised by the first objection, has been decided in the court of appeals, subsequent to the case of *Cayuga Co. Bank* v. *Warden*. (*Cook* v. *Litchfield*, *Selden's Notes*, *Dec.* 1853, *p.* 23.)

John B. Gale, for the respondent. I. The note has all the requisites of a negotiable promissory note. It is a promise for the *unconditional* payment of a *certain* sum of *money* at a *specified time*, to the order of the payee. (*Henschel* v. *Mah-*

ler, 3 *Denio*, 428.) (1.) There is, it is true, a contemplated possibility that performance of that promise may not be required—that the note may be surrendered before maturity, and exchanged for stock. The promise itself is, however, *absolute* and *unconditional*. Every promissory note, equally with this, is upon *condition* that it shall remain outstanding at maturity, and not have been previously taken up or satisfied by payment, renewal, or other means. (2.) It is not for the payment of money *and* the performance of any other act. In no event could the holder require money and stock. Stock could be required only upon a *surrender of the note*, and payment of money could not be required until six months after the holder's right to exchange it for stock had ceased. At its maturity payment of money was all that could be required; and such payment may be enforced without that hindrance which attends inquiries concerning specific performances and unliquidated damages, and by reason of which, contracts for the payment of money *and* the performance of some other act are denied the character and advantages of commercial paper. (3.) It is not in the alternative. A promise is an alternative one only when the promisor may fulfill it in either of two specified ways. Otherwise every promise is an alternative one, for the same may be *satisfied* (*legally* fulfilled) in whatever way the promisee may consent to.

II. The insertion in the note of the agreement to issue certain stock upon its surrender, has no effect upon the character of the note, as such, or upon the rights and liabilities of the indorsers and indorsee. (1.) The note retains, notwithstanding such insertion, every requisite and feature of a negotiable promissory note, and hence, it follows necessarily, that said agreement is without effect upon the liability of the defendants as indorsers. (*Pool* v. *McCrary*, 1 *Kelly's Rep.* 319.) Action on note at foot of which was a memorandum that the same might be discharged by releasing the plaintiff from his indorsement on another note therein described. *Held:* "By an examination of the instrument sued on, we hold that it wants none of the essential qualities of a negotiable note, and that it was right to declare on it as such. It is for the absolute and

unconditional payment of $1000 on a day fixed. There is a note or memorandum subjoined to the foot of it, specifying one of the modes in which it may be discharged." (2.) The converse of this point is not supported by any adjudged case or elementary writer. (3.) The principle upon which money promises that are conditional or alternative, or uncertain as to amount or time of payment and the like, are denied the character of negotiable paper, is, that that character and the consequence of a free circulation should not be afforded to paper that is uncertain in its terms, or involves inquiry about extrinsic facts. This note is *certain* and *definite* in its terms, and no extrinsic fact has to be determined, in order to enforce it, except the fact common to all negotiable paper, that it is held by the party seeking to enforce its payment. (4.) The note was evidently regarded by the parties as a promissory note, and indorsed accordingly.

III. The contract of indorsement is governed by the law of Massachusetts; and by that law the defendants are liable as indorsers. (*Jones* v. *Fales*, 4 *Mass. R.* 245.)

IV. If the note is not a negotiable promissory note, then the defendants are and should be liable as guarantors. (1.) Such is the law in Massachusetts, by which this question is determinable. (*Joselyn* v. *Ames*, 3 *Mass. Rep.* 274. *Sweetzer* v. *French*, 13 *Metc.* 262. *S. C.* 2 *Cush.* 310.) Held, that an indorser on an unnegotiable note is liable to indorsee, and that the latter may write a guaranty over the indorsement. (2.) Such is also the law in this state. (*Griswold* v. *Slocum*, 10 *Barb.* 402, *and cases there cited.*)

V. Complaint states the fact of indorsement. The nature and extent of the liability thereby incurred is a question of law, and not a *fact* to be alleged. Hence the complaint is sufficient, whether the defendants are indorsers or guarantors. But if not, it may now be amended; and there may yet be written over the indorsers' names whatever agreement that indorsement imports.

VI. The notice of protest was sufficient. (1.) It was only necessary to give a general description of the note. It was not ne-

cessary to state the number of the note, and thereby to distinguish it from notes otherwise like it. That there were such other notes did not then appear. The color of the ink or paper, or any other minute distinctive feature might as well be required to have been specified. It did not concern the defendants which one of the five notes was protested; but if it did it was their fault and not the plaintiff's, that a general description of the note did not give them all the desired information. (2.) The defendants were contractors on the road of the rail road company, and received the five notes in payment for work, and must have known the officers of the company—certainly the treasurer. The defendants knew by whom the notes were executed; indorsed the note in question; knew that the indorsement was outstanding; knew amount and date of note, and when it matured. The descriptive addition to the name of "Sam. Henshaw" plainly indicated that the note referred to was made by him as treasurer of some company, and the defendants had never indorsed any paper made by said Henshaw, except said five notes. Under such circumstances it is scarcely possible, and by no means probable, that the notice failed to inform the defendants that it referred to one of said five notes. (*Cayuga Co. Bank* v. *Warden*, 1 *Comst.* 413. *S. C.* 2 *Seld.* 19. *Smith* v. *Whiting*, 12 *Mass. Rep.* 5.)

VII. Whether the notice of protest under the attending circumstances gave the defendants the required information, is a mixed question of law and fact; and having been found for the plaintiff, the finding should not be reversed unless either the conclusion of fact is without evidence, or such finding necessarily involves an error of law. (2 *Seld.* 19.) What the contract of indorsement imports, and what information of non-payment had to be given to the indorsers as a condition precedent to their liability, are questions of law; but whether or not that legally required information was given in this instance, is a question of fact. The position that questions dependent upon ascertained facts are questions of law, is applicable only to *ultimate facts*, and not to those facts (which, in strict legal phraseology, are *evidence* as distinguished from *facts*,) from which another and

ultimate fact is deduced. In this case the ultimate fact that had to be ascertained was, whether certain requisite information was given to the defendants—and that *fact* depended upon, and had to be deduced from, the evidence afforded by the notice of protest and certain extrinsic circumstances. Again; because of that extrinsic evidence, the question involved was one of fact, although, otherwise, it had been one of law. (*Smith* v. *Whiting*, 12 *Mass. Rep.* 5.) Action against the indorser of Jothan Cushman's note. The notice described it as Jothan Cushing's note. The question was left to the jury. Parker, Ch. J., held: "It was properly left to the jury to decide," &c.

VIII. The note being payable to the defendants *or order*, is negotiable, and it having been indorsed in blank, possession is presumptive evidence of ownership. Such is the law in this state: and such is unquestionably the law in Massachusetts. (*See cases in Mass. Rep. above cited.*)

By the Court, GOULD, J. In this case there are three principal points to be considered. 1st. What, by the law of this state, is the primary contract (of the rail road company;) and what the contract made by indorsing it? 2d. What, by the law of Massachusetts, is that primary contract; and what the contract made by indorsing it? 3d. If, by any law binding this court, the primary contract be, or be so like, a negotiable note, as to require it to be, or make it capable of being, properly protested for non-payment, and the contract made by indorsing it, be such that the defendants were entitled to have such protest made, and due notice thereof given to them, was there such protest made, and such *due notice* thereof given, in this case?

As to the first point: the very strictest rule, as to what constitutes a promissory note, is that it must be a written promise to pay, (to a person named in it,) absolutely and unconditionally, a certain sum of money at a certain specified time. In this case there is no claim that the contract is not a written promise to pay, (to a person named in it,) a certain sum of money at a certain specified time. But, (say the defendants,) there is a subsequent

provision, that "this note," up to a time six months before the money was payable, might (at the election of the holder) be surrendered; and the holder on such surrendry, should be entitled to receive its amount in stock of the company, instead of money. And it is claimed that this provision takes away the essential quality, that the money must be payable absolutely and unconditionally. To this, the answer is, that to the promise to pay the money, there is attached no condition and no uncertainty. Unless, (not later than six months *before* the money was to be paid,) the holder saw fit to surrender and cancel the promise; if it remained in existence to the time when it promised to pay any thing, it remained an *absolute* and *unconditional* promise to *pay money only*. From its inception there was no instant at which it could have been paid by any thing but money. And there never was *any promise* to pay any thing else than money.

With these views, I, of course, hold the primary contract to be a promissory note, negotiable; and the contract made by indorsing it, to be the usual one of an indorser of negotiable paper.

The materiality of the second point is found in the fact, that every contract, (sealed, unsealed or verbal,) is the agreement of the parties as they understand it; unless such understanding (as claimed or attempted to be proved) be against the plain meaning of the terms used in a written instrument. Contracts resting on this basis, are to be held to mean, what the law of the place where the contract was made held them to mean. For ascertaining the *tenor*—the *interpretation*—the *nature* of the contract, the *lex loci contractus* governs. For deciding what *remedy* is applicable to the contract, (so interpreted,) the *lex fori* governs. In this case, the primary contract was made, and was to be performed, in the state of Massachusetts. The indorsement was also made there. In the Massachusetts decisions I find nothing to change the position taken by the plaintiff, (*Jones* v. *Fales*, 4 *Mass. Rep.* 254,) "that *all* cash notes are negotiable; and that all notes for merchandise may be sued by the promisee against the promisor; and when indorsed, by the

indorsee against the indorser." By the laws of that state, then, an indorser of any thing purporting to be a note, (whether for the payment of money, or any thing else, and whether or not by our law negotiable,) makes thereby the same contract as does (with us) the indorser of a negotiable promissory note; that is, if the drawer do not pay at maturity, the indorser will, if the usual steps be taken which would legally charge an indorser of a negotiable promissory note.

The defendants claim that this Massachusetts law refers only to the *remedy;* as the case cited (and others) speaks of the *manner of declaring* (against such an indorser) as being the same as "if the note were negotiable." But were not the law as is above stated, no manner of declaring could supply the legal basis, (the right of action) on which the declaration is founded.

The *third* question being thus reached, I cannot say that I deem it difficult of solution. The notice of protest, as a *notice*, has every element of sufficient certainty; date, time, amount, drawer, payees, indorsement, are all so set forth as to leave hardly a possibility of misleading the indorsers. It is true, the defendants say, (and it is admitted,) that there had once been in existence four other notes, answering precisely to all these points of description; and that the whole five were precisely alike, except the numbering. And then it is claimed that this notice is imperfect, because it did not state the number of this note to distinguish it from each of the other four. But the number is no part of the note; nor does the fact that four, (or four hundred,) other notes were just like it, except the number, make the number any part of the note. These defendants were the payees of all the five. And if they wished to make such a distinction between the several notes, that a notice of non-payment would identify each one; it was *their* business to make such a distinctive and substantive variance between the notes, (making each differ from every other,) that its description would be a legal essential to a good notice, irrespective of the fact of the existence of the other four. Nor do I see any thing in the cases, cited for the defendants, to vary this opinion. They

are all, (the case in *Selden's Notes*, as well as the rest,) speaking only of notices *imperfect on their face*. Then, and then only, are facts outside of the papers to be looked into, to see if there were really, and fairly, any ground for claiming to be actually misled by the notice given. The notice, in this case, is not imperfect on its face, and is sufficient.

There is a further reason why (if the question of the writing being a promissory note be considered a close and doubtful one) these defendants should be held on it as a promissory note. It describes or recites itself to be one, ("upon the surrender of this note;") on its face, it purports to be negotiable, (being payable to them "or order;") and by indorsing it in blank, they have passed it to the holder as a negotiable promissory note. They shall not, now, be permitted to deny that it is such. They must be held *estopped* from doing so.

The decision of the special term should be affirmed.

[Saratoga General Term, January 6, 1857. *James*, *Rosekrans* and *Gould*, Justices.]

GLEASON and others *vs.* THAYER, executor, &c. and others.

In an action against an executor, for the recovery of a legacy which the defendant alleges has been paid by him, to a stranger, for the benefit of the legatees, the stranger need not be made a party defendant.

THIS action was brought against the defendant Stephen H. Thayer, as executor of Cynthia Havens deceased, to recover a legacy of $1000 given to the plaintiffs by the will of the deceased, which was dated November 17, 1846. The testatrix died June 7, 1851. The residuary legatees were also made defendants. The cause came on to be tried at the Suffolk circuit on the 9th day of October, 1856, before Mr. Justice STRONG. The plaintiffs gave in evidence the will of Cynthia Havens, deceased, which proved the bequest by the testatrix to the plaintiffs, as alleged in the complaint, and thereupon the plain-

tiffs rested. The defendants then gave in evidence a receipt in the words and figures following, to wit: "Received, May 3, 1850, from Mrs. Cynthia Havens, one thousand dollars, being in part of a legacy left me by said Mrs. Cynthia Havens in her will, for my three children, Maria W. Gleason, William H. Gleason, Gabriel H. Gleason.

(Signed) CYNTHIA S. HAVENS."

The defendants then objected that Cynthia S. Havens who signed the said receipt, and who is the mother of the plaintiffs, should have been made a party to this action; and insisted that the trial ought not to proceed until she should be brought in and made a party defendant. The plaintiffs insisted that she was not a necessary party to the action, and offered to prove that Mrs. Havens never in fact received the money mentioned in the receipt, or any part of it, and that no part of the legacy given to the plaintiffs had been satisfied or advanced.

The judge decided that Mrs. Havens was a necessary party to the action, and ordered the cause to stand over to the next circuit, and that in the mean time Mrs. Havens be made a party defendant in the action. To this ruling of the judge the plaintiffs excepted, and appealed to the general term.

George Miller, for the appellants.

B. D. Silliman, for the respondents.

By the Court, BIRDSEYE, J. For aught that appears any where in this case, either in the answers of the defendants or the proof at the trial, Cynthia S. Havens, if she received the $1000, mentioned in the receipt of May 3, 1850, acted as an entire stranger to the plaintiffs. No authority from them to her to receive this money is pretended to exist. Upon an examination of the will it appears that the legacy was given directly to the plaintiffs, and not to Cynthia S. Havens for the plaintiffs. There is, therefore, no privity between the plaintiffs and Cynthia S. Havens. If she has become the recipient of these moneys for their benefit, they may, perhaps, bring an action

against her. But are they compelled to do so? She stands in the relation of a bailee of the property or money to which the plaintiffs are entitled; but such bailment has been made, not by the plaintiffs, either directly or indirectly, but by the person from whom the plaintiffs claim by privity of contract. Such a delivery is not a discharge of the obligation of the defendants to the plaintiffs, unless the money comes to their hands. And that such was the fact is not pretended here. If the transaction set forth in the receipt was not a *satifaction* of the plaintiff's claim, it is difficult to see how it can be an ademption or revocation of the legacy; nor is that really contended for here.

Doubtless it is the right of the defendants that Cynthia S. Havens be decreed to pay the fund or fulfill the trust conferred on her by the receipt in question; but that right is one arising out of a contract between her and the testatrix. The plaintiffs are not parties to that contract. The fact that the defendants have, by agreements *inter sese* or with strangers, and without the privity of the plaintiffs, contracted obligations toward each other, or imposed duties upon the strangers, with respect to the subject of the action, cannot compel the plaintiffs to introduce those strangers into the action, or to be at the trouble, expense or delay of settling the rights and obligations of the defendants as between themselves, or between them and the strangers.

Nor is Cynthia S. Havens properly liable to the plaintiffs in the first place, and the estate of the testatrix only secondarily liable. The testatrix made the contract with Cynthia S. Havens; she retained the evidence of it in her own hands. The utmost that the plaintiffs are entitled to do, is to affirm the transaction, if they so elect; but they are not compelled to make that election and resort to the stranger. He may be insolvent, or beyond the jurisdiction of the court; or, in this case, an improper, unsafe custodian of funds held on such a trust and for such a length of time; and free, too, from any liability to account before the surrogate, or to removal for unfitness or incompetency. The same considerations dispose of

the objection that the defendants are entitled to be subrogated to the rights of the plaintiffs against Cynthia S. Havens, and that she should therefore be made a party defendant. The executor holds the contract of Mrs. Havens, and on that has a direct remedy against her. Why then give him a new remedy by subrogation? Can a cumulative remedy be given in that manner? And if it can, will it be a ground for holding a stranger to be a necessary party to the suit, that the defendants may desire to obtain such a remedy against him?

Nor do I think that the defendants are sustained by the construction they seek to give to the 122d section of the code. The "controversy" here is between the plaintiffs and the present representatives of the estate of the testatrix; not between the plaintiffs and strangers to whom, without their assent, their property is committed by the defendants, or those under whom the defendants claim. The whole "controversy" will be terminated by the judgment in this action. If the defendants have any rights against Mrs. Havens, growing out of the receipt in question, they can maintain their action against her directly upon it. As that transaction is one to which the plaintiffs are strangers, they should be allowed, if they desire, to continue strangers to it and to the "controversy" growing out of it.

I think, too, that the offer to prove that Mrs. Havens never in fact received the money mentioned in the receipt, or any part of it, should not have been overruled. If she is made a defendant, and the fact shall be established, according to the offer, in what situation will the parties stand? She will have been wrongfully subjected to the expense and trouble of the suit. Who shall indemnify her therefor? Shall the plaintiffs? They left her out of the suit till compelled by the court to bring her in. They will upon that state of facts be entitled to recover both the legacy and their costs from the present defendants. Shall the present defendants pay her costs? They will have been the cause of her incurring them. But where is the authority for compelling one defendant to pay the costs of another defendant?

But, looking from the incidents to the merits, the receipt put

in evidence only made out a prima facie case against Mrs. Havens. The receipt was open to explanation, and will be so at the next trial. It was not the act of the plaintiffs, which can estop them; but of a stranger, which they may contradict. Why not have allowed this prima facie case to be contradicted at the late trial? Why subject the plaintiffs to this delay of more than half a year, which their proof at the next trial may show to have been quite unnecessary? Certainly if it shall then be proved that none of the money in question was ever received by Mrs. Havens, it will be difficult to say that a complete determination of the controversy could not have been had at the former trial, and without the presence of Mrs. Havens as a defendant; and that the court were compelled to cause her to be brought in.

Had this action been tried under our former chancery system the defendants could have set up the want of Mrs. Havens as a party, by plea or by answer. If by plea, the plaintiffs could have taken issue upon it; and the question whether she had in fact received the money would have been tried and determined before the sufficiency of the plea would have been decided. If by answer, then the parties might have gone on and taken all their proofs in the case, including the proofs whether she had received the money; and the court would not have had the opportunity, if it had the power, to adjudicate upon the matter, till the proofs were closed, and all the evidence before it. (1 *Barb. Ch. Pr.* 119, 321. *Van Epps* v. *Van Deusen*, 4 *Paige*, 75.)

The order made at the circuit should be reversed, with $10 costs.

[Kings General Term, January 23, 1857. *Brown, S. B. Strong* and *Birdseye*, Justices.]

Conant *vs.* Van Schaick

Day *vs.* Wood.

Day *vs.* Townsend.

McKinney *vs.* Phillips.

24 87
38 392
29h 40
38h 464
25a 223
37a 643
37a 647
46a 524
58a 367

The responsibility of the stockholders of a rail road corporation, for the debts of the company, under the 10th section of the general rail road act of 1850, was an original responsibility, and was that of general partners. Like the responsibility of partners, it entered into the essence of every credit given to the company, and was a part of the contract by which the debt was incurred. And the credit was given, and the creditor trusted, as well to the personal liability of the stockholders, as to the responsibility of the corporation.

But it was the intention of the legislature, by the 10th section of the act of April 15, 1854, amending the act of 1850, to repeal the provisions of the 10th section of the act amended. And as respects debts contracted since the passage of the amendment, the stockholders are *corporators* merely, and not *partners;* and as to such debts, an action cannot be maintained against them, by a creditor, after the return of an execution, issued against the company, unsatisfied, to render them personally liable.

The repealing clause, however, of the act of 1854, so far as it relates to rights of action existing at the time it was passed, was unconstitutional, as interfering with vested rights; and those rights remain untouched by it.

In an action by a judgment creditor of a rail road company, against stockholders, to enforce their personal liability, the mere proof that a judgment has been obtained by the plaintiff, against the company, and an execution returned unsatisfied, is not enough. The plaintiff must also prove that the debt, for which the judgment was recovered was of the sort named in the statute. And when this is done, the amount due on the execution is the rule of damages.

Such actions may be brought by all persons employed in the service of the company—whether as engineers, master mechanics or conductors—who have not a distinctive appellation, such as *officers* or *agents* of the company. The servant who employs and pays the man working with him, is entitled to the benefit of the maxim, *qui facit per alium facit per se.*

THESE actions were brought against the respective defendants as stockholders in the Albany Northern Rail Road Company, to enforce their alleged liability for the debt of the company, under that clause of the 10th section of the general rail road act of 1850, which provides that "all the stockhold-

ers of every such company shall be jointly and severally liable for all the debts due or owing to any of its laborers and servants for services performed for such corporation; but shall not be liable to an action therefor before an execution shall be returned unsatisfied, in whole or in part, against the corporation; and then the amount due on such execution shall be the amount recoverable with costs against such stockholders." In the first of the above cases, the plaintiff Conant seeks to recover for services rendered by him as a *civil engineer*, and for the services of a *rodman in his employ*. In the second, the plaintiff Day seeks to recover for work, labor and services rendered to the company by one Smalley who had assigned his claim to the plaintiff, and for other work, labor and services of the plaintiff, rendered by himself and *his servants*. In the third, the same plaintiff, Day, seeks to recover for work and labor of *himself, his servants and agents*, performed for the company; and the judgment against the company also includes a demand for money paid, laid out and expended by him for the company. The three cases all present the same general questions; and certain special questions, arising out of the distinctive points of each. The issues of fact joined in the cases were tried by the court, before Mr. Justice PARKER, at the Albany circuit, in March, 1855, and after taking the evidence and hearing counsel as to the questions arising in the respective cases, he directed a verdict for the plaintiffs, subject to the opinion of this court upon a case to be made, and with power to the court to render such judgment as upon the hearing might be found proper. The only evidence in the cases was that offered by the plaintiffs. It consisted, 1. Of the record of the plaintiffs' judgment against the company for the debt now sought to be recovered from the stockholder. 2. Of an admission by the defendants that the company was incorporated under the general rail road act of 1850, and that they respectively were stockholders at the time the services in question were rendered, and that an execution had been duly issued and returned unsatisfied against the company.

O. Meads, for the defendants Van Schaick, Wood and Townsend, submitted and insisted that the plaintiff was not entitled to recover, and that judgment should be rendered for those defendants respectively, for the following reasons.

I. The statutory liability of the stockholder, as created by the 10th section of the act of 1850, has been so far repealed or modified by the 16th section of the act of 1854, (*Laws of* 1854, *p.* 614,) as to exempt these defendants from the liability now sought to be enforced. (1.) The legislature have full power to repeal any liability they create, as to any cases that have not passed into judgment, unless the repeal impairs the obligation of a contract. (*Butler* v. *Palmer*, 1 *Hill*, 329, *and cases there cited.*) (2.) The liability here is not like that of the Rossie, Galena and other manufacturing companies—the mere common law liability of unincorporated partners for all the debts of the company—but a liability of a very different kind and extent, originating in and dependent on the statute; a liability covering only one very restricted class of debts, and including *costs*, which are not matters of contract. Costs of the judgment against the company could not be recoverable except by force of the statute. (*Bailey* v. *Bancker*, 3 *Hill*, 188.) (3.) The only *contract* is between the plaintiff and the corporation. The stockholder's liability is not such an one as would have resulted from his common law liability as a partner in a joint stock company, where no corporate exemption intervened, but is a special and peculiar liability, a creature of statute, and ceasing with the repeal of the statute.

II. But if the provisions of the act of 1850 are still in force as to these cases, the plaintiffs have not, *by proper evidence*, shown such a case as will render the defendants liable. (1.) The record of the judgment against the company was not evidence, as against the stockholder, either as to the nature or the amount of the original debt. It was evidence only of *the fact of its own rendition;* and, as such, was proper, in order to show that the requirements of the statute, preliminary to bringing an action against the stockholder, had been complied with. But in the language of Bronson, J. in *Moss* v. *McCullough*, (5 *Hill*,

134,) "the judgment was neither *conclusive* nor *prima facie* evidence, against the stockholder, of the original debt or demand against the company. That must be proved, as though the judgment had not been recovered." "The proof of the judgment (says Cowen, J., in the same case,) is not made with a view to estoppel, but as *res ipsa*." In its character of a *judgment* or *record*, it is binding and *conclusive*, as against the *parties* to it, for its own proper purposes and objects, and no further. (1 *Phil. on Ev.* 333.) As against others than the parties to it, it may, if material, as in the present case, be proved as *a fact*, but not as a *judgment or res judicata.* (*Moss* v. *McCullough*, 5 *Hill*, 134. *S. C.* 5 *Denio.* 567. *S. C.* 7 *Barb.* 279. *Cowen & Hill's Notes*, *part* 2, 815. *Id. note* 582, *p.* 820. *Slee* v. *Bloom*, 20 *John.* 669.) All the cases concur in holding the judgment not to be evidence of the facts contained in it, as against the stockholder, except the opinion of Willard, J., in 7 *Barb.* But in that case, it must be observed, there was other evidence of the original indebtedness than that contained in the judgment record; and it was also claimed that the judgment was evidence of the assent of the company to a disputed contract made by its agent. The case of *Slee* v. *Bloom*, does not, when examined, conflict with *Moss* v. *McCullough*, in 5 *Hill*, 134. The decree of the court of errors in the latter case, establishes *the bond*, given by the company on the liquidation of the original debt, to be *prima facie* evidence of the amount due, as against the stockholders, but does not make the *judgment* on that bond, evidence of the amount. On carefully examining the case of *Moss* v. *McCullough*, in the court of errors, (5 *Denio*, 567,) it will be found, that out of nineteen members who voted on the decision, thirteen either expressly or impliedly, sustained the opinion of the supreme court, in 5 *Hill*, 134. (2.) But if the judgment records in these cases were evidence as against the stockholders, still they do not show the facts necessary to charge these defendants. The services rendered by the plaintiff Conant, were not in the capacity of a "laborer and servant," but as a *civil engineer;* a man of professional skill and science. He was a

man in authority, having "servants" *of his own* under him The term "laborers and servants," as used in this act, is employed, not in a broad and general sense, but as technically descriptive of a class of persons, who from their humble and dependent position, stood in special need of legislative protection. This court has given this construction to the term *laborers* as used in the 12th section of this act; and the same reasoning is equally applicable to the 10th section. (*See MS. opinions of general term, 3d district, in Lee* v. *Troy and Boston R. R., and Atchinson* v. *same.*) The plaintiff cannot recover against the stockholder, for the services of the plaintiffs' servants. The act makes the stockholder liable only for debts due by the company to *its* laborers or servants, "for services performed *for such corporation.*" The services contemplated by the act are *personal* services, not services by agents or servants. On this point the amendment contained in the 16th section of the act of 1854, inserting the word "personal," is only *declaratory* and expressive of the intent and true construction of the original act of 1850. The *plaintiff's servant* is not the *company's servant*, nor under its authority or control. He is responsible only to his own master. One who employs agents and laborers in executing his contract with the company is a *contractor*, and not a laborer, within the meaning of this act. There are three classes of persons specially provided for by this act, (§§ 10 and 12,) viz: 1st. General creditors, (including *contractors*) after exhausting their remedy against the company, may resort to the stockholders for any balance remaining unpaid on their stock. 2d. The laborers and servants in the direct employment of the company, for their personal services, may resort to the stockholders. 3d. The *laborers* employed under contractors, may hold *the company* responsible for not more than thirty days' labor, provided they, within twenty days after it is performed, give notice to the company, as required by section 12. These provisions being in derogation of the common law, should be construed strictly. (*Lee* v. *Troy and Boston R. R. opinions above cited. Millered* v. *Lake Ontario, A. and N. Y. R. R. Co.* 9 *How. Pr.* 238.) (3.) In the cases

of *Day* v *Townsend*, and *Day* v. *Wood*, the judgment records even if admitted as evidence, do not show that the services in question were performed in the capacity of laborers or servants of the company; and it was for the plaintiff to make out a case bringing himself clearly within the terms of the statute.

III. The statute makes the amount due upon the execution against the company, the amount recoverable against the stockholder, and if any part of the judgment against the company is for a debt for which the stockholder is not liable, no part of it can be recovered. The statute has, for this purpose, made the judgment against the company an entire demand, incapable of being separated into its original constituent parts, and it must be recovered in whole or not at all. (1.) In all the cases, a part of the demand is for the plaintiff's own agents and servants; and in the case of Townsend, there is a demand included in the judgment for *money paid* by the plaintiff for the company. The fact that the costs are included, shows that the legislature contemplated that the judgment was to be only for such a demand as the stockholder was liable for; otherwise they would not have included the costs or would have authorized an apportionment. By what authority can the stockholder be charged for costs incurred, in part at least, on a demand for which he is in no way liable? By bringing a separate action against the company for the debt on which the stockholder was liable, the plaintiff would have avoided all difficulty. If the plaintiff by his own act has rendered it impossible to execute the statute according to its terms, the court has no power to vary the statute in order to relieve him.

Alfred Edwards, for the defendant Phillips. I. The legislature has the power to repeal any act which a former legislature was competent to pass, unless the act repealed was a grant or contract on the part of the state, or unless it impaired the obligation of a contract made by two or more persons. (*Fletcher* v. *Peck*, 6 *Cranch*, 87.)

II. The legislature has the power to take away *vested* rights unless they affect or impair the obligations which the parties

have undertaken. (*Charles River Bridge* v. *Warren Bridge*, 11 *Peters*, 420. *Satterlee* v. *Mathewson*, 2 *id.* 413. *Watson* v. *Mercer*, 8 *id.* 110. *See also the case of The State of Maryland* v. *Baltimore and Ohio Rail Road*, 1 *Am. R. R. Cases; Smith & Bates' Notes*, 1. *The Baltimore and Susquehanna R. R.* v. *Nesbit*, 1 *Am. R. R. Cas.* 39.)

III. The liability of the stockholder is *created and imposed by the statute.* It is a mere statutory liability. (*Moss* v. *McCullough*, 7 *Barb.* 279.) The cases of *Allen* v. *Sewall*, (2 *Wend.* 327;) *Moss* v. *Oakley*, (2 *Hill*, 119;) *Moss* v. *McCullough*, (5 *id.* 131; 5 *Denio*, 567; 7 *Barb.* 279,) involved the question as to whether the stockholder was liable at the time the debt was contracted or at the time the suit was brought; and though the court say the stockholder is not liable as a guarantor, but the same as if there were no act of incorporation, yet it is not stated that the liability is a common law liability. In 7 *Barb.* 279, it is said to be a statutory liability. In the cases last referred to, the stockholders of the Rossie Company were liable for all the debts of the company. At common law the partners are liable for all the debts. In this case they are liable, *severally*, for the labor debts, and to the amount unpaid on their stock for all the debts, which is not the common law liability.

IV. Before the stockholders can be charged, the execution must be returned unsatisfied, and no remedy is given until that is done. Before the right of the laborer to look to the stockholder attaches, the liability is repealed or new conditions imposed upon the laborer.

V. A right created by a statute can be impaired by the legislature. (*Butler* v. *Palmer*, 1 *Hill*, 329, *and the cases cited under the second proposition.*)

VI. If the laborer contracted with reference to the right to look to the stockholder, for the work due him from the company, he contracted also with reference to the law as it should exist when he seeks to enforce his right, *and to the right and power of the legislature to take away that right.*

VII. It is insisted that this liability created by statute, is not a *contract*, and that the word contract in the constitution,

means a compact made by parties, or a grant, an executed contract made by the state; when the state makes a contract, or grant and rights are vested under it, the grant cannot be revoked.

VIII. This case is not like the case of *Bronson* v. *Kinzie*, (1 *How. S. C. R.* 311;) *McCracken* v. *Hayward*, (2 *id.* 608;) nor the principles laid down by Story. (*Story's Const. U. S.* § 1374 *to* § 1399.) They refer to cases where the parties make a contract, and it is there held that the law where the contract is made governs the contract, so as not to allow the legislature to alter the rights of the parties. (*Id.* § 1385, *and notes.*) In this case the legislature have merely taken away the liability they imposed or inflicted.

IX. Section ten of the act of 1850, and the liabilities under it, are repealed by the act of 1854. The rule is that where an act or clause is repealed, it is the same as if it had never existed, and every thing incident to the repealed clause falls with it, unless saved by express words. Positive enactments, however, do not have a retrospective action, unless so expressly declared. The intention of the legislature may be gathered from sect. 16 of the act of 1854. (*See* 1 *Hill*, 329, *and cases cited.*)

Thomas Smith, for the plaintiff. I. The liability of the defendant as a stockholder created by the 10th section of the act of 1850, (*Sess. Laws, p.* 214,) was not released by the act passed April 15, 1854, (*Sess. L. p.* 614,) amending the said section. The legislature could never have intended that this amendment should have a retrospective operation, so as to affect claims for services performed under the original law. If so intended and it will admit of this construction, it is *unconstitutional* and *void* so far as it affects liabilities created before its passage. The liability of the stockholders under the act of 1850, is a *common law* liability founded upon *contract.* It is not a *general* but a *qualified* incorporation, making the stockholders jointly and severally liable for debts due its laborers and servants, in the same manner as they would have been liable at common law, or as partners if the company had not been incor-

porated. This principle has been settled by the court of appeals upon full deliberations in the case of *Corning* v. *McCullough*, (1 *Comst.* 47.) *See also Moss* v. *McCullough*, 7 *Barb.* 279; *Harger* v. *McCullough*, 2 *Denio*, 119, 123.) The laborer contracts upon the credit of the stockholder, and the moment his services are performed his right of action vests, and any law which purports to divest him of that right is *unconstitutional* and *void*. See 10th section of the constitution of the U. States: "No state shall pass any *ex post facto* law, or law impairing the obligation of contracts."

II. Proof of the judgment against the company is *prima facie* evidence against the stockholder. (*Moss* v. *McCullough*, 7 *Barb.* 279, *overruling the case in* 5 *Hill*, 131. *Moss* v. *Oakley*, 2 *Hill*, 265. *Slee* v. *Bloom*, 20 *John.* 669.) This follows from the fact that the stockholders are liable, as at common law, as partners, upon the original contract. (1 *Comst.* 47.) The statute contemplates that the judgment should be evidence as against the stockholders, by providing that the amount due upon the execution returned unsatisfied against the company shall be the amount recoverable, with costs, against the stockholders. (§ 10 *of general rail road act, session* 1850.)

III. It was insisted upon the trial, that the services in this case did not come within the meaning of the provision of the act making the stockholders "jointly and severally liable" for all debts due or owing to any of *its laborers* or *servants*, for services performed for the corporation. The construction given to the word *laborer*, in the 12th section of the act, can have no bearing upon the words *laborers and servants* as used in the 10th section. In the former the legislature have provided a remedy for laborers who are employed by contractors to work by the day so as to secure to them their pay at the expiration of every thirty days. While in the latter they have intended to protect all persons employed by the company, whether by the day, month or year, against the failure or insolvency of the company, by making the stockholders personally responsible. A civil engineer, who works with his instruments, is as much a

laborer and servant of the company as the man who uses the spade and shovel.

IV. It was also insisted that if the term *laborer and servant* does include civil engineers, it would not include an assistant who works under a civil engineer in the capacity of rodman. The work done by the assistant is to be regarded as the work of his employer, who is the servant of the company. It can make no difference to the stockholder whether the company are liable to the engineer or his assistant.

By the Court, GOULD, J. In this case, (*Conant* v. *Van Schaick*,) and in three others argued with it, it becomes necessary to pass upon the leading questions, as to the responsibility of the stockholders of rail road corporations for the debts of the companies, under the 10th section of the act of 1850, (*Laws of* 1850, *p.* 214.) considering that section as it originally stood; and then as amended, and in fact repealed, by the law of 1854; (*Laws of* 1854, *pp.* 614, 615, § 16;) and also, taking the two together, whether the repealing clause can, *constitutionally*, apply to rights of action existing prior to its enactment. And for a correct solution of all or either of these questions, it is necessary to ascertain the *nature* of the right; whether it be one given by statute, or whether it be a common law right which the statute has but failed to take away; involving, to some extent, the point whether the statute is to be deemed remedial, or in the nature of one imposing a forfeiture or penalty.

The whole ground of the construction of the statute, and the *nature* of this liability, is very fully and clearly stated and adjudicated in *Corning* v. *McCullough*, (1 *Comst.* 47.) By reading the 9th and 10th sections of the act incorporating the Rossie Galena Company, (*Laws of* 1837, *p.* 446,) and then turning to the Session Laws of 1850, pages 214, 215, § 10, no one can fail to see that the provisions of the two acts are, to all essential purposes, identical. And the case named decides that, whereas a *general* act of incorporation would take away the common law liability of all parties in interest, as parties, the effect of such a section retaining that common law liability is to

make the act of incorporation a qualified one; and that the responsibility (notwithstanding the statute directs the company to be sued first, &c.) is an original one, and is that of *general partners;* and, like the responsibility of partners, enters into the essence of every credit given to the company, and is a part of the contract by which the debt is incurred; that the credit is given, and the creditor trusts "as well to the personal liability of the stockholders, as to the responsibility of the corporation." And, further, that "this liability the stockholders voluntarily assumed, and it could not have been misunderstood by them." (*Page* 55.) And, on the same page, "When the plaintiffs sold and delivered their merchandise to the company whereof the defendant was a stockholder, they acquired a right of which nothing could divest them, to the liability of the defendant for the payment of the price of the goods; and the defendant incurred the obligation to answer and pay the debt thus incurred.' And at page 61 the action to enforce this liability is decided to be "*a common law action*, and *not* an action on statute." At page 58 it is decided that such a claim is "*not for a forfeiture or penalty*, or any sum of money or thing taken from the defendant and given to the plaintiff by a statute; nor upon any cause of action to which their whole and sole right or title rests upon a statutory provision entitling them thereto, *but for a debt contracted by the sale*," &c.

This decision manifestly covers the whole ground of the present suit; that is, as to the *nature* of the liability &c. under the law of 1850. (*See also* 7 *Barb.* 279.) What then is the effect of the law of 1854? The last seven lines of the 10th section, as amended, (at pages 614, 615.) are most clumsily expressed; as if drawn to *prevent* the legislature from *seeing the intent.* But there can be no doubt that the drawer intended them to repeal the provisions of the former 10th section, which did *not* take away this action, and the legislature must be presumed to have intended what the lines really mean. I have no doubt, therefore, that in regard to any debt incurred after the passage of this amendment, the stockholders are *corporators* merely.

and *not partners:* and as to all such debts, an action like this could not be sustained.

And here comes in the question, is this repealing clause if, or so far as, it applies to rights of action already accrued, (according to the law of 1850,) prior to the passage of the repealing act, constitutional? There is no dispute that those rights were then vested rights. Then the decision, so fully quoted from above, (1 *Comst.* 47,) comes in, to give a decided, unequivocal answer on this point. The right is not created or given by statute, but is a common law right; and the liability of the stockholders is a part of the contract. Such being the law of this state, and this repealing act being, as clearly, one that takes away the right, and not merely one that affects the remedy, it is, so far as intended, or attempted, in this suit, to be applied to rights of action which accrued prior to its passage, unconstitutional, and those rights remain untouched by it.

There is a minor point, which is involved in each of these cases, which is, how far the judgment which the plaintiffs, respectively, have recovered against the company, (and which, by the law of 1850 they were bound so to recover before suing the stockholders,) is *evidence* in such cases. There is an *apparent* difficulty in answering the question; from the fact that, by the act, the amount of the recovery against the stockholder must be "the amount due on the execution" issued on the judgment against the company, and returned unsatisfied. Still it is palpable that judgments against the company may be recovered for a variety of causes not named in the section referred to. And were the mere proof that a judgment had been obtained against the company, and an execution on that judgment had been returned unsatisfied, to be held sufficient to make out the case, it is most manifest that the liability of the stockholders would, thereby, be extended to *every* debt of the company, no matter for what incurred. The plaintiff in such cases as these should be held to make out his case. By the statute he must prove that he has recovered judgment, against the company, and that the execution thereon has been returned unsatisfied. But this is not all; he must then go on and prove the debt for which

the judgment was recovered, to be of the sort named in the act, and when this is done, the amount due on the execution is the rule of damages.(*a*)

Next there comes up, for consideration, what are the "services performed for such corporation," by "any of its laborers and servants," for which such suit may be brought? Or, *who* may bring such suit? I reply to this question, I see no middle ground, between restricting it to day laborers, and applying it to all persons employed in the service of the company who have not a different proper and distinctive appellation; such as *officers* and *agents* of the company. The engineer, the master mechanic, the conductor, is as fully entitled to its benefits as is the man who shovels gravel. The latter is, in law, no more and no less a *servant* of the company than either one of the former. And (this question really applying only to the *class* of debts covered,) the servant who employs and pays the man who works with him, is fully entitled to the benefit of the maxim, *qui facit per alium facit per se.* And the company (and the stockholder) for whose benefit the work is done, (the work being of the nature named in the law,) has no right to complain that the whole question is tried in one suit, rather than in half a dozen. And these causes of action are assignable, beyond all doubt.

To apply these principles to the cases before us.

1. In the case of *Conant* v. *Van Schaick* the whole of the plaintiff's demand is good as against the defendant; provided he prove in this suit, that the services were rendered, as set forth in his complaint in the court below. But inasmuch as he rested on proving his case by the record only, a new trial must be had, to give him opportunity to prove his case.

2. In the case of *Day* v. *Wood*, the decision must be the same.

3. In the case of *Day* v. *Townsend*, the plaintiff must fail,

(*a*) This point did not, and could not, arise in the case of the Rossie Galena Company; because the stockholders of that company were liable for *all* the debts of the company; no matter of what description, or for what consideration.

because his judgment against the company includes a claim for money paid &c. for the company.

4. In the case of *McKinney* v. *Phillips*, the decision must be the same as in the first two.

[Albany General Term, March 2, 1857. *Harris*, *Watson* and *Gould* Justices.]

Brinckerhoff *vs.* Phelps.

24 100
43 472
18a 257
20a 146
28a 270
40a 59
42a 172
69a 204
69a 434

In an action for the breach of a contract to convey lands, the true rule of damages is, the value of the land at the time of the breach, and interest from that time.

APPEAL from a judgment entered at a special term, after a trial at the circuit. The complaint alleged that on the 13th day of June, 1849, the defendant made, executed and delivered to the plaintiff an agreement in writing, in the words and figures following, viz: "For and in consideration of the sum of one dollar to me in hand paid by Elizabeth Brinckerhoff, of the city of Albany, the receipt whereof I do hereby acknowledge, I do hereby agree to sell and convey unto the said Elizabeth Brinckerhoff, all that lot, piece or parcel of land, situate, lying and being in the town of Stratford, Fulton county and state of New York, known as lot No. 82, in Glen, Bleecker and Lansing's patent, for the sum of seven shillings per acre, to be paid therefor by said Elizabeth Brinckerhoff. The said lot to be surveyed at the expense of the estate for which I act as trustee; and the said Elizabeth Brinckerhoff is to pay for the actual number of acres contained in said lot, as shall appear by such survey, at the rate aforesaid. A warrantee deed is to be executed and delivered to said Elizabeth Brinckerhoff by the 15th day of July next, by which time said survey is to be completed and the lot to be conveyed free and clear of all incumbrances. The sum of three hundred and eighteen dollars and twenty-five

rents of said purchase money is to be paid on the execution of this contract, and the balance on the execution and delivery of the deed. Dated Albany, June 13, 1849.

(Signed) PHILIP PHELPS, *Trustee, &c.*"

The plaintiff further alleged that upon the execution of the foregoing contract or agreement, she paid to the defendant the sum of $318.25, in full of the payment therein mentioned. And that afterwards and prior to the month of August, in the year 1849, the lot in the agreement set forth was surveyed and found to contain 835 acres of land, or thereabouts. That on several occasions thereafter the plaintiff by her attorney and agent applied to the defendant, and demanded a warranty deed for the said lot of land, according to the provisions of the agreement, and offered to pay him the balance of the purchase money on the execution and delivery of such deed, with which demand the defendant had neglected and refused to comply. And that the defendant did not, by the 15th day of July, 1849, execute and deliver or offer to execute and deliver to the plaintiff a warranty deed for said lot, so as to convey the same or any part thereof to the plaintiff. Wherefore the plaintiff demanded judgment that the defendant execute and deliver to her a warranty deed for the lot, so made and executed by the defendant as to vest in her, the plaintiff, the title to the same free and clear of all incumbrances; the plaintiff hereby offering to pay the balance of the purchase money of said lot. And in case it should appear that the defendant was unable to convey to the plaintiff the lot aforesaid, so as to vest in her the title thereto free and clear of all incumbrances, then the plaintiff demanded judgment against the defendant for the damages which she had sustained by reason thereof, together with costs. &c.

The answer of the defendant set up that he executed the agreement as trustee of Catharine W. Van Rensselaer, and not otherwise; that individually he was never the owner of the premises described in the agreement; that the agreement was made with Edward Brinckerhoff as the plaintiff's agent, and that he well knew when the same was made that the defendant

held the lands as trustee, &c., and that the consent of Catharine W. Van Rensselaer was necessary to a valid and effectual conveyance thereof, as did also the plaintiff. That although the defendant had been willing he had not been able to convey, &c. In the reply, the plaintiff averred that neither before nor at the time of making said agreement, had she any knowledge how the defendant had been appointed trustee, nor what his powers were as such trustee. The reply also denied that the plaintiff or Edward Brinckerhoff knew at &c., that the consent of Catharine W. Van Rensselaer was necessary to a valid and effectual conveyance of the premises aforesaid. That at the time of the execution of the agreement the defendant held out and represented, that he had the power and authority to sell and convey the premises. The defendant offered to let judgment be entered against him for $366 and costs.

The cause was tried at the Albany circuit, in December, 1852, before Justice HARRIS, a jury being waived. The plaintiff proved the execution of the agreement. He also proved that prior to the month of August, 1849, the defendant procured the lot to be surveyed, that according to such survey it contained 835 acres; and that thereupon the plaintiff tendered to the defendant the balance of the purchase money for said lot, and demanded a warranty deed therefor according to the provisions of the agreement, and that the defendant refused to comply with such demand, stating as the reason of such refusal that Mrs. Van Rensselaer had positively refused her consent to any conveyance of said lands to the said plaintiff. It was then admitted by the counsel for the defendant that the lot in question, at the time fixed in the agreement for the delivery of the deed, and at the time the same was demanded by the plaintiff, was worth the sum of $2000, and that the defendant had sold it to another person for that sum, upon the request and by consent of Mrs. Van Rensselaer. The testimony here closed, and the judge decided that the plaintiff was not entitled to recover any thing in this action beyond the amount ($318.25) paid by her to the defendant at the time of the execution of the agreement, with interest and costs of action. To which de-

cision the plaintiff's counsel excepted. The counsel for the plaintiff insisted that under the pleadings and evidence the plaintiff was entitled to recover by way of damages the sum of $2000, less the balance of the purchase money remaining unpaid; but the judge decided that the plaintiff was not so entitled to recover, and the counsel for the plaintiff excepted to such decision, and appealed from the judgment entered thereon.

J. K. Porter, for the appellant.

J. H. Reynolds, for the respondent.

By the Court, GOULD, J. The only point to be here decided is, what is the true rule of damages, in a suit for the breach of a contract to convey lands. Is the plaintiff in such a suit to recover his actual loss, (the value of the land agreed to be conveyed;) or is he to be confined to getting back the price he paid, and interest? Upon principle, there would seem to be no question about it; for mere justice requires that his recovery should be equal to his loss. That there is any doubt on the subject, is owing to the uniform current of the decisions in this state, which have fixed the rule of damages in suits on the covenants of seisin, warranty, &c. in deeds; and to the general, though not uniform, transferring of that rule to suits where no deed has been given; but the contract for giving one has been broken by reason of inability, or refusal, to convey.

I cannot say that I have ever been satisfied with the rule that in an action on a covenant for quiet enjoyment, I am entitled to recover, not what the premises I enjoy are worth when I am evicted, but merely what I paid for the land; without any reference to my improvements. In the leading case in this state, (4 *John.* 3,) although the opinions which so hold are very able, and entitled to profound respect, my reason has ever been better satisfied with the dissenting opinion of Mr. Justice SPENCER. He says, "In actions for a breach of covenant, the damages are to be estimated according to the value of the thing *when the covenant was broken.*" And, (in reply to the

ground taken by the majority of the court, holding that the covenant of seisin is the greater covenant, and covers or includes the covenant of warranty, so as to govern the damages recoverable on the latter,) he says: "These covenants, wherever they occur in a deed, seem to me to indicate, beyond all question, that the purchaser did not mean to rely on the title of the vendor alone; but that he meant to have his personal liability, as a guaranty." Nor does that latter remark seem to me to be covered or met by the opinion, (3 *Caines*, 118,) where it is said, "If a grantee be desirous of receiving the value of land at the time of eviction, he may by apt covenants in the deed, if a grantor will consent, secure such benefit to himself." What those "*apt* covenants" would be, when in 4 *John.* 3, the same court say that a covenant for further assurance is, also, in subordination to the superior covenant of seisin, and cannot go beyond it in a rule of damages, it might be difficult to imagine. If neither a covenant that I shall enjoy the property, nor a covenant to make my title good, goes beyond the bare covenant that the grantor has title, at the time he conveys, what form of personal promise (or covenant) would relieve me from the incubus of that paramount covenant of seisin?

These remarks are, of course, made not with any idea of there ever being any change in our rule of damages in suits on those covenants, but merely to show that there is no reason for extending that rule beyond the line of the decided cases.

It is truly said, in the case at bar, if the defendant had given a deed, (which, as he had no title, would not have conveyed the land,) nothing beyond the purchase money and interest could possibly have been recovered from him. Still that is not this case. And it by no means follows, because such would have been the rule of damages had he kept his contract, that such is the rule now that he has broken his contract, in a suit for that breach.

The cases cited for the defendant (2 *Wend.* 399, *and* 4 *Denio*, 546) are hardly parallel with this case. They are cases where, by mistake or misfortune, the party was unable to keep his contract. In this case he knew his exact position, and ventured

to make this contract; and (as in 13 *Eng. Com. Law*, 101,) I think he must be responsible for the damage sustained by a breach of this contract." This is not a new rule (in such a case) in this state. The doubt suggested in 6 *Barb.* 650, "whether a more stringent rule might not have been adopted, and the plaintiff been allowed to recover the value of the land, at the time of the refusal to convey," has, in 4 *Selden*, 115, ripened into an affirmative ruling. This latter case seems to me to cover the principle involved in the one before us. Phelps either made a contract which he knew he had no right to make, or he arbitrarily refused to fulfill when he found he could get more than twice the price for his land that the plaintiff had agreed to pay. And the latter is, neither in morals nor in law, any better reason than the former. The rule of damages, as against him, should be the *value* of the land, at the time of the breach, and interest since then.

New trial granted.

[Albany General Term, March 2, 1857. *W. B. Wright, Harris* and *Gould*, Justices.]

Wilson, president of the Catskill Bank, *vs.* Forsyth and others.

24 105
33 135
39 102
43 472
44 667
46 157
57 263
63 175
49b 372
39a 300
85a 472

Where a debtor interposes a fraudulent obstruction, to prevent his creditor from collecting a judgment on which the creditor's remedy as against the specific property covered by the fraud would have been ample at law, but for the fraudulent obstruction, a court of *equity* will interpose to clear away that obstruction, so that he may pursue his legal remedy with effect.

To entitle himself to this relief, the creditor must show in his complaint, where he follows his remedy against real estate—1. That there is such real estate; 2. That the judgment would have been a lien thereon, had not the fraudulent obstruction been interposed; 3. That by reason of such interposition his execution cannot reach it, and that therefore his remedy at law is not sufficient.

A complaint alleged that on the 30th of September, 1853, F. was the owner of certain real estate; that on that day the plaintiff commenced an action against him in the supreme court, to recover a debt, and sued out an attachment

against the property of F. as an absconding debtor, and delivered the same to the sheriff, who attached the real estate of F.; that the plaintiff obtained a judgment in his action, and docketed the same on the 24th of January, 1851, and issued an execution the next day, on which the sheriff made a portion of the debt, out of the personal property, leaving a balance due and unpaid upon the judgment; and that F. had no other personal property, from which such balance could be made. That on the 24th of August, 1853, F. assigned all his property, real and personal, to the defendant; who, under such assignment, claimed to hold and possess the right to and over the real estate; and that such assignment was fraudulent and void, and was made with intent to hinder, delay or defraud the creditors of F. and particularly the plaintiff. And the prayer was that the assignment might be set aside as fraudulent and void as against the plaintiff.

Held that such a case was not stated as was necessary to give the court *equitable* jurisdiction of the matter; there being no averment that the plaintiff's remedy *at law* was not ample; no claim that the assignment hindered or obstructed him in enforcing his execution, or prevented his selling the real estate thereon; and no averment that a purchaser on such a sale could not contest the validity of the assignment; or that *any* purchaser could not contest it *at law*.

Held also, that this was not the usual creditor's bill, of the old practice, to which the return of an execution unsatisfied was a condition precedent, while in this case the execution was not returned at all. Nor was it a suit to remove a cloud upon the title, because the plaintiff did not pretend to have any title.

Held further, that the plaintiff having obtained judgment in the action in which the attachment was issued, and an execution having been issued thereon, and a balance remaining uncollected, the sheriff could sell so much of the real estate attached as was necessary to satisfy that balance.

Such a judgment, when obtained, for its lien on both the personal and real estate attached, relates back to the time of levying the attachment; taking its priority from that date.

In determining as to the validity of an assignment made by a debtor, the *intent* of the *assignor* is the material consideration. Honesty of purpose in the *assignee* is not the test.

Nor is it material to inquire what *other* acts, besides making the assignment, the assignor has done; or whether those acts are fraudulent or otherwise.

In each case the only pertinent inquiry is, with what intent was the assignment made.

An assignment giving preferences among creditors, and not embracing *all* the debtor's property, is not void for those reasons.

And, as a debtor is not bound to assign *all* his property, to make his assignment valid, so the assignment is not necessarily rendered invalid by his failing *to deliver* all of his personal property to the assignee, although the whole is assigned.

Although it is a general rule that to give full effect to an assignment of personal property, delivery of the property and a continued change of possession are

requisite, and the assignor's continuing in possession of the whole or even a part of the assigned property is *a badge of fraud*; yet, where there is no inventory of the assigned property, accompanying the assignment, the assignor's retaining some property that he might have assigned, or that—being covered by the general terms of his assignment—he might have delivered under it, is not an act that will make the whole assignment void of course.

To render an assignment void, when not void on its face, as a matter of law, the fact of a fraudulent intent *in making it* must be found, and found from evidence that will fairly support the finding. It must also be an intent to commit a fraud on creditors by *making the assignment*, and not by some entirely independent act.

It is erroneous to charge the jury that if the assignor, on absconding after executing the assignment, carried off a sum of money with him, the assignment is void, and that it becomes the duty of the jury to find that it was executed with intent to hinder, delay and defraud creditors.

It is also erroneous to charge that if the assignor, when he executed the assignment, intended to reserve a large sum of money to his own use, and did take it away with him, after the assignment was made, the case is the same as if the money had been reserved on the face of the assignment.

ACTION to set aside an assignment made by James C. Forsyth, of his property, in trust for the benefit of his creditors. The complaint set forth, that on the 13th of September, 1853, the plaintiff obtained a warrant of attachment against the property of James C. Forsyth, and delivered the same to the sheriff of Ulster county, commanding him to attach the real and personal property of said James C. Forsyth in said county; that certain real and personal estate was attached thereon, by the sheriff; and that the plaintiff afterwards, and on the 23d day of January, 1854, obtained a judgment against said James C. Forsyth for $10,379.57, and issued an execution thereon to the sheriff of Ulster county; that said James C. Forsyth executed an assignment of all his property to the defendant Robert A. Forsyth, dated August 23, 1853; and that said assignment was made to hinder, delay and defraud the creditors of the assignor; and prayed that the same might be set aside, and the order of priority of the several liens thereon adjudged and settled by the court; the plaintiff claiming a priority of lien upon the real estate seized on his attachment. The answer of the defendant, Robert A. Forsyth, admitted the execution of the assignment, but denied that it was executed

with intent to hinder, delay or defraud creditors; and denied each and every allegation of the complaint.

The cause was tried at the circuit in Greene county, in November, 1855, before Justice WATSON and a jury.

The counsel for the plaintiff having opened the cause to the jury, and stated the nature and object of the action as set forth in the complaint, it was urged and insisted by the counsel for the defendant Robert A. Forsyth, that the plaintiff should not be allowed to introduce any evidence under the pleadings in this action: 1st. Because the plaintiff had not sold the lands described in the complaint, under his execution. 2d. Because no execution on the plaintiff's judgment had been returned unsatisfied in whole or in part. 3d. Because the plaintiff could not, under the pleadings, try a question to remove a cloud upon the title, nor to set aside the assignment, nor to declare a preference among liens on the property. The court overruled the objection, and decided that the plaintiff might proceed to give evidence, in order to maintain the issue on his part; to which ruling and decision the counsel for the defendant Robert A. Forsyth excepted. The plaintiff's counsel, in his opening, having proposed to give proof of specific facts out of the assignment, and not appearing on the face thereof, for the purpose of proving fraud in fact on the part of the assignor, the counsel for the defendant, with the consent of the court and of the counsel for the plaintiff that such question should be raised at this time, urged and insisted that the plaintiff was not entitled to give evidence of extrinsic facts not appearing on the face of the assignment, for the purpose of showing it to be void, because no such facts were alleged or set forth in the complaint, and because no specific acts of fraud, or acts showing a fraudulent intent, were alleged in the complaint. The court overruled this objection, and decided that the plaintiff might give evidence of extrinsic facts out of the assignment, to show that the assignment was made with intent to hinder, delay and defraud the creditors of the assignor. To this decision the counsel for the defendant excepted.

It was proved, among other things, that immediately after

executing the assignment, James C. Forsyth sailed for Europe, taking with him a bag of gold amounting to $5000, which he had procured with the proceeds of a check drawn by him upon a bank. There was also evidence given, tending to prove that a short time before making the assignment, the assignor had committed various forgeries, for the purpose of raising money.

The plaintiff having rested his case, the counsel for the defendant, Robert A. Forsyth, moved for a nonsuit, and to dismiss the complaint, upon the following grounds, viz: "1st. Because the plaintiff is not in a position to maintain this action, because he has not sold the land under his execution; and because the execution has not been returned. 2d. Because, under the pleadings, no evidence of fraud is receivable, except such (if any) as appears on the face of the assignment; and because the assignment is legal and valid on its face. 3d. That there is no evidence of actual or intended fraud, either in the assignor or assignee. 4th. That there is no sufficient evidence that the assignor did not deliver all his property to the assignee. That there is no sufficient evidence that the bag of gold belonged to the assignor at the time of the assignment. 5th. That the omission to deliver the gold, or any other personal property not known to the assignee, would not render the assignment void, or affect any other property which passed into the hands of the assignee, and would not be sufficient evidence of fraud to avoid the assignment." The court overruled and denied the motion, and the counsel for the defendant, Robert A. Forsyth, excepted. The following facts were then admitted by the counsel for the plaintiff, viz: That immediately after receiving the assignment, the assignee took possession of all the real estate which belonged to James C. Forsyth, at the time of executing the assignment, the same being all situated in the county of Ulster; and also all the personal property which belonged to James C. Forsyth at the time of the execution of the assignment, and which was principally in Newport and Kingston; and that he continued in possession of the said property, until the same was taken by the sheriff under the attachment; this admission not to apply to any property which may have been taken

away by James C. Forsyth when he left for Europe, but to embrace all the property in Newport, New York and Ulster county, and all of which the defendant Robert A. Forsyth had any knowledge or information.

The defendant having rested, and the evidence being closed on both sides, the judge charged the jury, substantially as follows:

"I charge you, that the plaintiff is in a position to commence this action in order to set aside the assignment of James C. Forsyth, on the ground that it was made with intent to hinder, delay and defraud the creditors of the assignor. The plaintiff's claim, that this assignment is fraudulent and void, and the issue which has been framed by the court and sent here to be tried before you, is whether the assignment was executed by James C. Forsyth with intent to hinder, delay or defraud his creditors. I charge you, that if this assignment was made by James C. Forsyth with intent to hinder, delay or defraud his creditors, it is void as against the creditors of the assignor, although the assignee was free from all imputation of participation in his fraudulent designs. I charge you, that unless the assignor surrendered to the assignee all the property which he had liable to execution at the time of executing the assignment, the assignment is void; and I charge broadly and distinctly, that if James C. Forsyth did not deliver over all his property to the assignee, the assignment is void. I charge you, that this assignment purports on its face to assign all the personal property of the assignor, and in that respect is free from all legal objection. The assignment is dated the 24th of August, 1853; it was executed on the same day. When the assignee was called upon in Kingston, he said he did not know how or when he received it. It is a question for the jury, from the evidence, as to when it was delivered, or whether it was ever delivered. Evidence has been given tending to show that on the 23d of August, 1853, James C. Forsyth got a check for $5000 changed for gold, and took passage, and the next day sailed for Europe in the Cunard steamer Africa. And then you have the evidence of the purser on the Africa, that there was placed in his possession for safe keeping a box of gold; and the evidence of Judge

Parker, that he met him in Europe on the 4th of September, on the arrival of the Africa. Judge Parker was well acquainted with him; but the jury must compare the description given by the boy in Mr. Cunard's office, and by the purser, with the description given by Mr. Westbrook, of James C. Forsyth's personal appearance. Take all these facts together: did he deliver up and surrender all his property? I charge you, that if he carried off this $5000, or this bag of gold, whatever it may have contained, the assignment in question cannot be upheld, and it becomes your duty to find that the assignment was executed with intent to hinder, delay and defraud creditors. If the assignor intentionally withheld from the possession of the assignee $5000 belonging to the assignor at the time of the assignment, and took the same away with him to Europe immediately after the assignment, with a view to appropriate the same to his own use, then I charge you, that the presumption of fraud mentioned in the statute to which I have referred, would attach to this assignment as against the creditors of the assignor, and the assignment in that case would not be upheld, unless it was made to appear that the same was made in good faith, and without any intent to defraud the creditors. I charge you, that if the assignment was made by the assignor with an actual intent to hinder, delay and defraud the creditors of the assignor, it would be void in toto. It would not in such case be void as to the personal property not delivered, and valid as to the residue, nor would it be void as to the personal, and valid as to the real estate assigned. I charge you, that if when he executed the assignment he intended to reserve the $5000 to his own use, and did take it away with him to Europe, the case is the same as if the $5000 had been reserved on the face of the assignment. Although some judges have regretted the existence of the law which allows an insolvent debtor to make a preferential assignment, yet the law of this state allows such assignments when they are honestly made, and the debtor surrenders his entire estate for the benefit of his creditors. This assignment being valid on its face, the creditors have a right to resort to evidence outside the assignment in order to ascertain whether it was made

with a fraudulent intent. If the determination of the question depended solely on what appeared on the paper itself, it would have been an idle ceremony for the court to order an issue to be framed with a view to a trial by a jury of that question. In addition to the facts already alluded to, the jury must look at all the facts drawn out by the proof. I charge you, that you may consider the evidence tending to prove the fact, that the assignor was largely indebted at the time of making the assignment for money drawn by him upon forged paper, which was about maturing, as a part of the history of this case, upon the question of fraud. It is claimed that the relationship existing between the assignor and assignee, and between the assignor and his preferred creditors, and the absence of schedules of the assigned property and the debts of the assignor, and also his absconding from the country without taking leave of his family; also if any of the preferred debts are invalid, are all badges of fraud. But it does not by any means result that these circumstances, any or all of them combined, are legitimate evidence to prove a fraudulent intent. These facts may exist, consistently with an honest motive on the part of the assignor, and in regard to these particulars, each case must stand on its own circumstances. The jury may inquire whether, in other respects, the assignee, although a brother of the assignor, was a suitable and proper person to act as assignee, and whether an honest indebtedness existed in favor of the preferred creditors, although they were related to the assignor; and if satisfied in these respects as to the bona fides of the assignment, the relationship of the assignor, or of the preferred creditors, would be no objection to the validity of the assignment."

The defendant R. A. Forsyth excepted to this charge, and every part thereof. The jury found by their verdict, that the assignment in question was executed by James C. Forsyth with intent to hinder, delay and defraud his creditors.

The defendant Robert A. Forsyth made a case and exceptions, and the court directed the same to be heard in the first instance at a general term.

L. Tremain, for the plaintiff. I. The objection that the plaintiff should not introduce any evidence, because no execution on his judgment had been returned unsatisfied, was correctly overruled. This action will lie to set aside any fraudulent transfer of real estate, which may deter purchasers from bidding upon the property, as soon as a lien is obtained by judgment, without issuing an execution. (*Parshall* v. *Tillou*, 13 *How.* 7. *Clarkson* v. *De Peyster*, 3 *Paige*, 320. 1 *id.* 305. 4 *John. Ch.* 677. 1 *Aikins on Cond.* 513.) In this case, all the personal property of the judgment debtor had been sold on a judgment in favor of the Bank of the Commonwealth. In that action an attachment had been issued and levied upon property prior to the levy by the plaintiff.

II. It was proper to show by the cashier of the Catskill Bank, that the indorsements upon the note on which Forsyth procured the money for which the plaintiff's judgment was rendered, were forged, as that fact enabled the plaintiff to recover for the money, before the notes matured.

III. It was competent to prove that the assignor was largely indebted to various persons at the time of the assignment.

IV. Evidence that such indebtedness arose for moneys procured from the banks on forged paper, was manifestly proper. It was part of the *history* of the indebtedness and connected with it, and part of the *res gestæ*. This court held, in *Pratt* v. *Webster*, that a maker might, on a defense of forgery, prove that the indorsement was forged, as part of the history of the matter. It was competent as evidence that these forged notes were about maturing when the assignment was made, and thereby furnishing a *motive* for fraudulently disposing of his property liable to execution, and secretly absconding from the country with his money. It was competent, within the familiar principle, that in cases involving the question of fraud, the utmost latitude in proving the conduct of the party charged, is allowed. (*Jackson* v. *Timmerman*, 12 *Wend.* 299. *Cary* v. *Hotaling*, 1 *Hill*, 311. *Olmsted* v. *Hotaling*, *Id.* 317, *and cases cited in last two cases.*)

V. Proof of the *secrecy* with which the assignor absconded at

the time he made the assignment was properly received for the same reasons.

VI. The proof in relation to the $5000 check was competent and vitally important, as proving that the assignor had that amount of money at the time of the assignment, which was taken by him from the country.

VII. The proof showing that the assignor absconded secretly at the time he made the assignment, was manifestly proper to show the motive of the assignor, and his conduct in connection therewith. (*See cases cited under Point IV.*)

VIII. The charge that the assignment was void if made with a fraudulent intent, although the assignee was innocent, was obviously correct. (*Rathbun* v. *Platner*, 18 *Barb.* 272. *See cases cited*, 2 *Paige*, 54. 1 *Sandf. Ch.* 85.)

IX. The charge that if the assignor did not surrender all his property, *this* assignment was void, was correct. There was no attempt whatever made to explain the fact that Forsyth took away the $5000. The assignment gave *preferences* and therefore was void unless the assignor surrendered *all* his property liable to execution. (10 *Paige*, 128. 6 *Hill*, 438, 9. 11 *Wend.* 194. *Burrill on Assignments.*) The *whole* charge must be construed together, and it is manifest from the other portions of the charge, that the judge left the question fairly to the jury. As to evidence *dehors* the instrument, see *Burdick* v. *Post*, (12 *Barb.* 182 *to* 186; *Id.* 168.) As to inventory, see 15 *id.* 56.

X. The verdict was manifestly warranted by the evidence.

John Thompson, for the defendant R. A. Forsyth. I. The plaintiff is not in a position to maintain this action. (1.) It cannot be maintained as a *creditor's bill*, because no execution on the plaintiff's judgment has been returned unsatisfied. The jurisdiction of the court in such case rests upon the plaintiff having exhausted his legal remedy. It is no answer to this objection that they proved on the trial that the personal property had all been exhausted by previous executions. The only legal proof that there is no property which can be reached by the execution, *is the officer's return on the process.* While the

execution remains, other property may be found, and the court cannot legally know until the actual return of the execution, that property may not be found, sufficient to satisfy it. (2.) It cannot be maintained as a suit to remove a cloud upon the title, *because the plaintiff has no title.* In order to have brought himself into a position to seek this kind of equitable relief, the plaintiff should have sold the land under his execution, have taken a sheriff's deed, and then have filed his bill. (3.) The allegations of the complaint are not sufficient to entitle the plaintiff to maintain this action to remove a fraudulent obstruction from the way of his execution. In order to entitle him to this kind of relief, he should have alleged that the judgment debtor had property which, but for the fraudulent assignment, would be subject to his execution; and such facts should be stated affirmatively and positively in the complaint, and not be left to inference (*McElwain* v. *Willis*, 9 *Wend.* 548.) The complaint is fatally defective in this particular. It alleges expressly that there is no personal property. As to the real estate, the complaint alleges that James C. Forsyth was seised thereof on the 13th of Sept. 1853. There is no allegation that he continued to own the real estate, or that he was ever seised of any real estate after the 13th Sept. 1853. The plaintiff's judgment was not docketed until January 24th, 1854. Until he obtained his judgment he had no such lien as would entitle him to maintain this action. (*Thomas* v. *Merchants' Bank*, 9 *Paige*, 216.) A seizure under attachment is not such a lien as will entitle the creditor to maintain an action of this kind. (*Crippen* v. *Hudson*, 3 *Kern.* 161.) The complaint should have alleged, that but for the assignment the real estate would have been subject to the plaintiff's judgment. It does not do this. (4.) The code of procedure has introduced no alteration of the rules of pleading in this respect. (*Otis* v. *Sill*, 8 *Barb.* 102.) (5.) It is not a case for amendment of the pleadings under the 173d section of the code; especially as the objection was taken at the trial and overruled.

II. The plaintiff was not entitled to give in evidence extrinsic fact, not appearing on the face of the assignment, for the purpose of showing it to be void, by establishing fraud in fact or

the part of the assignor, because no such facts, nor any specific acts of fraud, nor any facts whatever showing a fraudulent intent, are alleged or set forth in the complaint. The rule of pleading is, that the complaint shall contain a "statement of the facts constituting the cause of action." There is but one allegation upon the subject of fraud, in the complaint, viz: "That the assignment was made by the said James C. Forsyth with intent to hinder, delay or defraud his creditors, particularly the plaintiff." No allegation of fraud is made against the assignee, nor can he be presumed to know any of the specific facts upon which the plaintiff might rely. It is submitted, that under this allegation standing alone—and as against an innocent assignee—the plaintiff should have been confined to such evidence of fraud as he might be able to detect upon the face of the assignment itself, and ought not to have been permitted to prove the various independent and extrinsic facts which he did give in evidence.

III. The proof that the assignor had committed forgeries, was irrelevant. It did not tend to show that the assignment was made with intent to defraud creditors. The forgeries were a separate and distinct matter, in no way connected with the assignment. A man may make a valid assignment even after being guilty of the most serious offenses.

IV. The court erred in charging the jury that if James C. Forsyth made the assignment with intent to hinder, delay or defraud his creditors, it was void as against his creditors, although the assignee was free from all participation in his fraudulent designs. To render an assignment void, it must be *executed* with intent to defraud. The execution of a deed consists not only in signing it, but also in its delivery; and a delivery implies a person to receive as well as a person to deliver. A perfect execution must therefore be the joint act of the parties—of the assignee in receiving, as well as of the assignor in signing and delivering. If the assignee is free from any intent to defraud, the execution of the assignment cannot be said to be fraudulent. The assignee being himself a creditor acting for the protection of his own debt, and being free from fraud, is entitled to be regarded in a court of equity in the light of a pur-

chaser in good faith for a valuable consideration; and should therefore receive the protection which the statute extends to such purchasers.

V. The court erred in charging the jury that unless the assignor surrendered to the assignee all the property which he had liable to execution at the time of the assignment, the assignment is void; and broadly and distinctly, that if James C. Forsyth did not deliver over all his property to the assignee, the assignment is void. Also, that if James C. Forsyth carried off the bag of gold, the assignment in question could not be upheld; and that it became the duty of the jury to find that it was executed with intent to hinder, delay and defraud creditors. The statute makes the non-delivery of the personal property assigned presumptive evidence of fraud; it transfers the burthen of proof to the assignee. But this charge of the judge treats it as being conclusive, and admitting of no explanation or excuse.

VI. The court erred in charging the jury that if the assignor, when he executed the assignment, intended to reserve the $5000 to his own use, and did take it away with him to Europe, *the case is the same as if the five thousand dollars had been reserved on the face of the assignment.* If it had been reserved on the face of the assignment, the assignment would have been absolutely void. No extrinsic proof could have made it otherwise. It would have been pronounced void as a matter of law. But the assignment being valid on its face, the intent with which it was executed was a question of fact. The omission to deliver part of the property merely raised a presumption against the good faith of the transaction, which presumption the defendant was at liberty to introduce proof to overcome and repel. This portion of the charge places it beyond doubt that the judge intended to be understood as holding that the taking away of part of the property, by the assignor, was absolutely fatal to the assignment, and not merely presumptive evidence of fraud.

By the Court, Gould, J. The defendant Robert A. Forsyth takes, in this case, a preliminary point; that the plaintiff, on his own showing, is not entitled to any relief, even if the assign

ment be fraudulent. The principles bearing on this point, are these: Where a debtor interposes a fraudulent obstruction, to prevent his creditor's collecting a judgment, on which judgment the creditor's remedy (as against the specific property covered by the fraud) would have been ample at law, but for the fraudulent obstruction, a court will interpose its *equitable* jurisdiction to clear away that obstruction; "so that, the obstruction being removed by the action of the court of equity, he could pursue his legal remedy with effect." (3 *Kernan*, 166.) To entitle himself to this relief, the creditor must show in his complaint, (where, as here, he follows his remedy against *real* estate,) 1. That there is such particular real estate; 2. That the judgment would have been a lien thereon if the fraudulent obstruction had not been interposed; 3. That by reason of such interposition, his execution cannot reach it, and therefore his remedy at law is not sufficient. (*See* 9 *Wend.* 561, 2.)

In the case before us, the averments are, that on the 13th Sept. 1853, James C. Forsyth (the assignor) had certain real estate, which is particularly described; that on that day the plaintiff commenced an action against him, and in it sued out of this court an attachment against the property of said Forsyth, as an absconding debtor, and caused the same to be delivered to the sheriff of Ulster county, (where the lands are situated,) and that said sheriff did immediately attach the specified real estate as the real estate of said James C.; that, in his said action, the plaintiff obtained judgment against said James C. on the 23d of January, 1854; docketed the same in Ulster county the 24th of January, 1854, and issued his execution thereon the 25th of January, 1854; on which execution said sheriff made, out of the attached personal property of said James C., some $8000 and over, "and that there still remains due and unpaid on said judgment about $2000;" and that said James C. "has no personal property in Ulster county from which any part of the balance of said judgment can be made." The plaintiff proceeds to say that, on the 24th of August, 1853, said James C. made the assignment in question, purporting to convey to his assignee, Robert A. Forsyth, this specific real estate; that under that

assignment said Robert "claims to hold and possess the right to and over said real estate, given him in and by said instrument;" (not averring that that is even colorable title;) and that said instrument is fraudulent and void, and was made with intent to hinder, delay or defraud the creditors of said James C. and particularly the said plaintiff. And he concludes by asking that said assignment be set aside as fraudulent and void as against the plaintiff. This complaint would seem not to make the case, which is necessary to give this court *equitable* jurisdiction of the matter. There is no averment that the plaintiff's remedy, *at law*, is not ample; no claim that the assignment hinders or obstructs him, in enforcing his execution, or in any way prevents his selling this very real estate on that execution; and no averment that a purchaser on such sale, (whether this plaintiff, or a third person,) would not be in just as good a position to contest the validity of the assignment, as is this plaintiff here; or that *any* purchaser could not contest it, *at law*.

I give no weight to the defendant's claim, that there is no averment that James C. was ever seised of this real estate after September 13, 1853; because it is entirely clear, (*Code*, § 237, *division* 2,) that the plaintiff having obtained judgment in the action in which the attachment was issued, and an execution having been issued thereon, and a balance remaining due after the application of the attached personal property, the sheriff can sell so much of this real estate attached as may be necessary to satisfy that balance. These provisions make entirely certain the rule, that such a judgment, when obtained, for its lien on both the personal and real estate *attached*, *relates back* to the time of *levying the attachment;* taking its priority from that date.

The complaint in this suit, however, can have effect in no other view, than the one above set forth as answered by the preliminary objection of the defendant R. A. Forsyth. Since it is not the usual *creditor's bill* of the old practice, to which the return of an execution unsatisfied was an absolute condition precedent; while this execution is not returned at all: nor is it

a suit to remove a cloud upon title; because the plaintiff does not pretend to have any title.

There is one other controlling view of this case; and as it is one that is rather to be gathered from several cases, than to be found clearly decided in any one suit, it is best to consider it here, independently of the previous ground, and as if the complaint made a case entitling the plaintiff to the relief he would like to have. And as this view is based entirely on the statute, it is necessary to see precisely what the statute is, as well as to consider what was the common law, without and before any statute on the subject.

The statute is, (2 *R. S. p.* 137, *margin*, § 1,) that "every conveyance, or assignment of any estate or interest in lands, &c., made with intent to hinder, delay or defraud creditors, or other persons, &c., as against the persons so hindered, delayed or defrauded, shall be void." In the face of this statute—too plain to admit of doubt—it will not do to say that honesty of purpose in the *assignee*, has any effect whatever on the *intent* of the *assignor;* and this latter is the intent with which the assignment is made. *He* makes the assignment, and no one else: and the making intent is his, and no one's else. There is no need of referring to authority on such a point; but it has been so decided, (*see* 18 *Barb.* 272–4.)(*a*)

Nor, on the other hand, is it in the least degree material to the question of the validity of the assignment, to ask *what other acts* besides making the assignment, the assignor has done; or how fraudulent or otherwise those *other* acts are. A very dishonest man may make an honest assignment; and a very honest man may make one that the law will pronounce fraudulent and void. But, in

(*a*) It must be borne in mind that I speak for this case, and the principles it involves; and that, therefore, what I say is spoken in reference only to *voluntary* assignments *in trust* to *pay debts:* not as to conveyances of an actual estate to, and for, the grantee; (which latter are the cases of most of the English authorities as to fraudulent conveyances.) In England, and here, where the estate and benefit are to and for the grantee, (of a deed of a farm to A. for a price, or to pay a debt to him;) the *bona fides* of the grantee may and does operate to make good a conveyance which the grantor intended to help him to delay and defraud other creditors.

each particular case, the only pertinent inquiry is, with what intent was the *assignment* made? You may, doubtless, go outside of the mere naked writing, to show *facts* bearing on the question of fraudulent intent. But they are, then, nothing but evidence of what was the intent, with which that writing was made. As, for instance, leaving the assignor in the possession and control of assigned personal property; this (unexplained) tends to show, that the transfer was intended but as a cover; and is always proper evidence, on the question of fraudulent intent in making the assignment. Here it is not the subsequent act that renders void the instrument; but the presumption, therefrom, of the *prior intention;* an intention to give color of title to an assignee, to hinder creditors from interfering with the property; and yet leaving the control, real disposal and benefit, to the assignor. Under this statute, the instrument itself is, like any other instrument or contract, good, or bad, *at the time of its making*. And the then present intent is neither varied by, nor does it give place to, any subsequent intent.

Now, at common law, a debtor could pay a debt by a transfer of property, real or personal, as well as by counting out the silver. And he could so transfer, or pay, to one person for the use or benefit of another who was his creditor, or of *two* others, creditors. And he could, in either way, pay one creditor instead of, or in preference to another. And this, whether he was solvent or insolvent. I am aware that this has, once, been styled (while conceding it to be the common law,) an "iniquitous principle of the common law," (citation in 10 *Paige*, 229.) But with all due deference to the judge who ventured that remark, I must say that I do not see how common law principles could be shaped to general ends in any other way. To make a different general rule, would be to take away a man's rights over his own property, while it remains his own; and to vest, somewhere, an authority perfectly inquisitorial. If there were found, resulting from the general rule, a particular mischief, there could be, by statute, a particular remedy applied; as there has been. To apply this remedy, have been passed the

English statutes against fraudulent conveyances, and the acts of bankruptcy; various statutes in the different states of this union; and the very statute we are considering in this case. And in applying this remedy, (and especially as against fraud,) we must give the statute a liberal construction; to abridge the mischief, and enlarge the remedy. But we must not strain the statute to make it mean what it does not. And, (for one thing,) the statute does *not* mean that an assignment giving preference to one creditor over another, is fraudulent and void. If it meant so, it would have said so; for it was passed at a time when such assignments were well known among us. Nor does it mean that the assignor's failing to assign *all* his property, in any assignment, with or without preferences, makes his assignment fraudulent and void. If it meant that, it would have said it. In other states, where the legislatures did so mean, they have so said, and compelled the assignor to add his oath to the fact that the assignment is of all his property. (*See Burrill on Assignments*, 223 *to* 227.) Among these states is Massachusetts; and in that state, before their statute, which is of comparatively recent date, there were many express decisions that an assignment of *part* of one's property, to *pay* part of one's debts—giving preferences of necessity, and in fact—were perfectly good. Such certainly must be the common law rule; and such I take to be, as certainly, the rule under our statute. And the decisions of our own courts, which are not infrequently claimed to countenance a contrary rule, to hold an assignment giving preferences void, unless it be a transfer of *all* the debtor's property, are by no means authorities to that point. To examine them: 3 *Barb. Ch. Rep.* 644; this was a case where a person having ample property to pay all his debts, (*not* insolvent,) assigned *all* his property, giving the assignee authority to use the avails for the defense of any suits against the assignor by his creditors; and attempting to set apart and appropriate a part of the property for the use of his wife. It was there properly held, that if he had not ample means to pay all, then this appropriation for his wife made his assignment void. And it was further held, if his means were ample to pay the whole

any assignment of *all* his property could be only to delay and hinder creditors; the more especially as he provided for the use of those means in defending suits against himself. And it is to this extent only, that 18 *Barb.* 275, is supported by its references; and it does not profess to be so supported any further; for its citations follow this sentence: "assignments of this kind [of *all* one's property,] preferring creditors, can only be made by an insolvent debtor." The subsequent sentence, (that they are only tolerated, "when devoting the *whole* property of the debtor to the payment of his debts;") is entirely unsupported by even a reference; and it is not a remark touching the case. The only point in that case was, whether an assignment of all the debtor's property, to assignees who acted in good faith, and were bona fide and preferred creditors to more than the whole amount of the assigned property, could not hold the property as against another creditor; notwithstanding the assignor made the assignment with a fraudulent intent—that being unknown to the assignees. The judge, at circuit, charged the jury that they could so hold as is the English law. *This* point was taken up; the charge decided erroneous, and a new trial ordered.

The case in 6 *Hill*, 438, was where a debtor assigned "nearly all" his property, for the payment of four of his creditors; providing that any surplus after paying those four debts, should go to the use of the assignor, he being insolvent. And the assignment was held bad on that ground. But it is supposed that Mr. Justice Bronson, in giving the opinion of the court, and (at page 439, 40) while putting it expressly on that ground, states views against all assignments giving preferences; and really holds that all one's property must be assigned, or the assignment will be bad, when he says such assignments are allowed to stand only where the debtor "makes an unconditional surrender of his effects, for the benefit of those to whom they rightfully belong;" citing several cases. Of these cases, the principal and far the strongest one, containing reviews and citations of all his others, is 11 *Wend.* 587. And by turning to this case and examining it, with its references, we shall probably be able to arrive at such basis as there is for such a hold-

ing; (supposing, for the present, that the learned judge ever so held.) And to take them in their order.

First, in date, of those references, is 2 *P. Wms.* 427; there a party, not having committed any act of bankruptcy, to bring him within that statute, assigned *part* of his property to a particular creditor to pay his debt; (which was held good;) and that case is so far from holding that to make it valid the assignment should have been of *all* the debtor's property, that it holds, expressly, that had it been of the whole, it would for that reason have been void. And that case says, "there is no such thing as an equitable bankruptcy; it must be a legal one" (to give the statute effect;) and "there may be a reason for a bankrupt to prefer one creditor before another;" and further, it holds that if a chose in action were so assigned, and the assignee were thereby obliged to come into a court of equity to enforce it, the court of equity would enforce it. The next case cited is 1 *Atkyns*, 154, (*marginal page.*) This was also a *partial* assignment, to pay a particular debt; and there was no decision in the case. But the issues, settled to be tried, referred to the date of the assignor's "bankruptcy;" and to the actual transfer prior to that date; the reasoning, and the reporter's note of the case, going to sustain the assignment. The reasoning is Lord Hardwicke's. We next find 5 *Term Rep.* 234. 424. At page 234 it is held, (and that is the whole case,) that a confession of judgment to one creditor, whereby he obtained two hours' priority of levy, and thereby a preference over another creditor, was not fraudulent, within the statute against "delaying, hindering or defrauding" creditors, and that statute covers judgments by confession; though made with the express intent to give the preference. And at page 424, though the case is one of a *partial* assignment, giving preferences, and really does not meet the point under discussion, although the assignment was held good, it is said by Lord Kenyon, "it is neither illegal nor immoral to prefer one set of creditors to another. It was never held, even in the case of a trader, that he could not give a preference in some respects, provided the property he set apart for the payment of one or more favorite creditors, did not exhaust his whole estate;

or approach so near to a disposition of the whole as that the exception was merely colorable;" citing what precisely supports him, 1 *Burr.* 477, 8. While in this case (in Burrow) the court, by Lord Mansfield, say, "there is a great difference between the conveyance of *all* and of a *part*. A conveyance of a *part* may be public, fair and honest; as a trader may sell, so he may openly transfer many kinds of property, by way of security;" while conveying *all* would be an act of bankruptcy, (under their statutes; that point should be borne in mind in reading all these English cases.) At page 425 of 5 *Term Rep.* Ashurst, J., says, "there is no objection to a debtor's preferring one set of creditors to another, unless in certain cases on the bankrupt laws. Where the bankrupt laws do not interfere, a debtor may give preferences to particular creditors;" the statute against fraudulent conveyances not stopping it. In the next case, (6 *Term Rep.* 152,) a creditor took part of a debtor's stock in trade, as a security for his debt; and it was held good. And that is all there is of that case. Next is 8 *Term Rep.* 521. There the transfer did not profess to be of all the debtor's property; and it gave preferences. Nor did the creditor make any point of its being, really, of all; and it was held good. And there (at page 528) in support of the deed, and treating it as if of all the debtor's property, Lord Kenyon says; "but putting the bankrupt laws out of the case, a debtor may assign all his effects for the benefit of particular creditors." He (Lord Kenyon) having previously (5 *T. R.* 424) decided that, (not "putting the bankrupt laws out of the case,") a debtor might assign part, for such a purpose. Next is 4 *East*, 1; which was an action to set aside a confessed judgment, which really did delay and hinder the (there) plaintiff, in collecting his debt; and yet it was held good. And (at page 13,) Lord Ellenborough, Ch. J., says, "it is not every feoffment, judgment, &c. which will have the effect of delaying or hindering creditors of their debts, &c.; that is therefore fraudulent within the statute; for such is the effect, *pro tanto*, of every assignment that can be made by one who has creditors. Every assignment of a man's property, however good and honest the consideration, must diminish the fund,

out of which satisfaction is to be made to his creditors. But the feoffment &c. must be devised of fraud," &c. Next is 3 *Maule & Sel.* 371; where a debtor, for general benefit of all creditors, assigned *all* his property; and the act was sustained. But it was sustained, and stated to be, on the principles of the cases in 5 *Term Rep.* above set forth, which were cited on the argument by the prevailing party; and (3 *M. & Sel.* 376) approved by Lord Ellenborough. And (page 375) he says, "the principle of those decisions would be destroyed, if we should hold an assignment fraudulent, because it may operate to the prejudice of a particular creditor." Next, (coming to our own courts,) is 5 *Cowen*, 547. There there was a general assignment of *all* the debtor's property, securing certain benefits to himself, and with various other provisions. And the decree made in the case, by the court for the correction of errors, (*see p.* 586,) is, "that the assignment is void by reason of the trust, or provision contained therein, for the benefit of said William Cairns," (the assignor.) And I can find nowhere in the case even a remark that a debtor, to give preferences in an assignment, must assign *all* his property. And the reporter's note is to no such effect. The main point he notes is, that "an insolvent debtor *may* pay some creditors in preference to others; and may secure his preferred creditors by assignment in trust for such creditors; but he can make no assignment of any part of his property in trust for himself."

Turn now to the case specially relied on, 11 *Wend.* 187. It was a case in the same court, (for the correction of errors;) and the actual decision (*p.* 225, 6) is, "that the assignment is void, because it makes the preference given to the creditors of the assignors, designated as class No. 2, to depend on the condition that the preferred creditors shall give the assignors an absolute discharge from their debts." And this was, actually, the only point in the case; and the first paragraph of the reporter's head note is not in the decision. It might seem (at page 194) to be found in the opinion of Mr. Justice Sutherland, where he says, "it is perfectly settled, both in England and this country, that a debtor in failing circumstances has a right to prefer one cred

tor or set of creditors to another, in all cases not affected by operation of a bankrupt system. He may assign the whole of his property for the benefit of a single creditor, in exclusion of all others; or he may distribute it in unequal proportions, either among a part or the whole of his creditors. No matter how, or upon what principles, the distribution is made, if the debtor devotes the whole of his property to the payment of just debts, neither law nor equity inquires" &c. And yet, it is perfectly apparent, by this same case, that the doctrine contended for has really no support from that able judge: for, (at page 195,) he says of assignments giving preferences, "all that is now competent for our courts to do, is to see that they fairly appropriate all the insolvent's property, or such portions of it as he undertakes to assign, to the payment of his just debts; and are not made the instruments of placing it beyond the reach of his creditors, and for the benefit, immediate or remote, of the insolvent himself." Nor does Mr. Justice Bronson, (in 6 *Hill*,) as I understand his opinion, mean to say any such thing as is claimed. He does not mean to go beyond the case before him; and (looking fairly at his opinion, as a whole,) it would seem to me that, in the remark cited at the beginning of this discussion, he intends no more than he says at page 440, that the assignor must "part with all control over the property, and devote it absolutely to the benefit of his creditors, without any reservation or stipulation for his own advantage." And this is found as true, by referring it to such property as he does assign, as it would be if it refer to his assigning his whole estate.

It must follow, from the conclusions already stated, that the assignment of Jas. C. Forsyth, (either independent of the statute, or under it,) although it gave preferences, and did not assign *all* his property, would not be for that reason void. And as he was not bound to assign all his property to make his assignment valid, so his assignment is not necessarily rendered invalid by his failing to deliver all of his personal property to the assignee, though none is excepted on the face of the paper. It is true that to give full effect to an assignment of personal property, delivery of the assigned property, and a continued

change of its possession are required. And a failure to deliver, or rather the assignor's continuing in possession of the whole (or even a part) of the assigned property, is a *badge of fraud.* But, where there is no inventory of the assigned property, accompanying the assignment, the assignor's retaining some property that he might have assigned, or that (being covered by the general terms of his assignment) he might have delivered under it, is not an act that of course makes his whole assignment void. And there is no case, in which it was ever thought of being held, that an assignor's failing to *empty his pockets*, (whether of $5. or $500 :) or his not delivering his watch, or his breast-pin, or his penknife, made void a general assignment, otherwise good.

All an assignor's acts, connected with, or coincident in time with, his assignment, may generally be inquired into; because the law allows the greatest latitude, in searching for evidences of a fraud, which from the nature of the case, must be confined almost exclusively within the assignor's bosom. But to make the instrument void, when not so on its face, as matter of *law*, the fact of a fraudulent intent in making it, must be found, and found legitimately, from evidence that will fairly support the finding; and it must be, also, an intent to commit a fraud on creditors by making the assignment; and not by some *entirely independent act*, which might, and probably would, have been done precisely as it was, had no assignment been made or dreamed of.

As this court understand the law to be, the charge given at the circuit is certainly erroneous, where it says, that unless the assignor surrendered to the assignee all the property which he had, liable to execution, at the time of executing the assignment, the assignment is void; and that if J. C. F. did not deliver over all his property to the assignee, the assignment is void. It is also erroneous in saying that if J. C. F. carried off this $5000 or the bag of gold, whatever it may have contained, the assignment in question cannot be upheld; and that it became the duty of the jury to find that it was executed with intent to hinder, delay and defraud creditors. It is also erroneous

in saying that if, when J. C. F. executed the assignment, he intended to reserve the $5000 to his own use, and did take it away with him to Europe, the case is the same as if the $5000 had been reserved on the face of the assignment.

A new trial must be ordered.

[ALBANY GENERAL TERM, March 2, 1857. *Wm. B. Wright, Harris* and *Gould*, Justices.]

CHANDLER and others *vs.* NORTHROP.

24 129
40 422
43h 198
26a 63

Previous to the act of 1850, "for the protection of purchasers of real estate upon sales by order of surrogates," the *onus* of proving that the surrogate had jurisdiction of the subject matter, and of the persons interested in the property, was upon those claiming title through the proceedings before the surrogate and the sale. But since the act of 1850, the *onus probandi* is upon those whom claim in opposition to a sale had under an order of the surrogate, to show that no guardians were appointed, by the surrogate, for infant owners.

The legislature, by the act of 1850, intended to include all sales which had been previously made, by order of surrogates, pursuant to the provisions of the original act, and which provisions are contained in the revision of such act. Sales made prior to the enactment of the revised statutes, and under the revised laws of 1813, were therefore embraced.

The act of 1850 was not unconstitutional, as applied to sales of property made before the passage of the act; no vested right being thereby impaired or changed, but merely a rule of evidence.

MOTION for a new trial, upon exceptions taken at the trial, and ordered to be heard at the general term. The action was brought to recover the possession of real estate. The plaintiffs gave in evidence a conveyance including the premises, executed by Wilhem Willink and others to John Livingston, dated June 15, 1816; also a deed from Livingston and wife to Isaac Chandler, dated March 9, 1818; also a deed from Isaac Chandler and wife to Josiah V. Chandler, dated September 14, 1828. These deeds were duly recorded. The quantity of land conveyed was 175 acres. Josiah V. Chandler

entered under the conveyance from Isaac. He died in October 1828, in possession, leaving Clinton V. and Adula his only children and heirs at law, the former less than one year old and the latter less than three. In June, 1844, Adula intermarried with the plaintiff Joseph W. Phillis. The land claimed in this action was about 20 acres of the 175 acres, and no portion of it was cleared or fenced. The defendant gave in evidence a warranty deed from Clark Dart and wife to Joseph Northrop, dated April 10, 1830, of the 20 acres. Also a deed from Thayer Northrop, Benjamin Northrop, George Northrop and John Northrop, dated April 19, 1851, of the 20 acres. Joseph Northrop entered into possession of the land more than 20 years prior to the trial, and continued in possession until his death, some six or seven years before the trial. The grantors in the deed to Stephen Northrop, the defendant, were the heirs at law of Joseph. The defendant Stephen entered under the deed to him, and was in possession at the time this action was commenced and at the time of the trial. The defendant rested, and the plaintiff then proved that the 175 acres deeded to Livingston had for thirty years past been known as the middle part of lot two. That Livingston was in possession of the house, and had improved a portion of the 175 acres at the time he conveyed to Chandler. The plaintiff rested, and the defendant asked the court to direct a verdict in his favor, on the ground that the plaintiff had not shown any title in Josiah V. Chandler. That the only title Chandler had was a naked possession of premises adjoining the lands in controversy; that the defendant and his grantors had been in the actual possession of the premises for more than twenty-five years, under a deed; that upon the whole case the defendant was entitled to a verdict. The defendant also asked that the plaintiff be nonsuited. The court refused to give such direction, and denied the motion for a nonsuit, and the defendant excepted. The defendant then gave in evidence a deed of the 175 acres executed by William Northrop, as administrator, and Alina Chandler as administratrix, of the goods, &c. of Josiah W. Chandler, deceased, to Clark Dart, dated October 16, 1829.

This deed was given in pursuance of an order made by the surrogate of Erie county, directing the sale of the premises, and contained the usual recitals. The bill of exceptions contained the proceedings before the surrogate, resulting in the appointment of Mrs. Chandler and William Northrop, administratrix and administrator; also the proceedings resulting in a sale of the real estate, and a confirmation of such sale, &c. The records of the proceedings in the surrogate's court did not show that any guardian was appointed for the infant heirs of Josiah V. Chandler. The defendant proved by a witness who was a clerk in the surrogate's office in 1828, at the time the proceedings were had, that he remembered the proceedings had before the surrogate for the sale of the real estate; that at about the time the proceedings were commenced, Mrs. Chandler was at the surrogate's office and had her little children with her. This witness stated that previous to 1840, the record books and papers in the surrogate's office were kept in a negligent and disorderly condition, without much system. The defendant rested, and the plaintiff called Elvira Pierce, who was the widow of Josiah V. Chandler, and mother of the plaintiffs Adula and Clinton. She stated that she had some recollection of the proceedings before the surrogate to sell her husband's land to pay debts; that she did not recollect of any guardian being appointed for the children, to protect their interest in the proceedings; that she was at the surrogate's office two or three times; thinks her children were not with her; that she told the surrogate about them and their ages; that she trusted the business to Northrop, now dead, and the surrogate, who is also dead. The evidence being closed, the defendant's counsel insisted that the defendant had shown a good title; that enough had been shown to give the surrogate jurisdiction. He asked the court to decide that if the plaintiffs claimed that no guardian had been appointed by the surrogate for the infant heirs, the burden of proof was upon them to show that fact; that the law would presume a guardian had been appointed; that at any rate the defendant had a right to have that question submitted to the jury, under the evidence.

The court decided that the plaintiffs were entitled to a verdict, and so directed; and the defendant excepted.

J. L. Talcott, for the plaintiffs.

F. J. Fithian, for the defendant.

By the Court, MARVIN J. It was conceded upon the argument that, by the law as settled in this state, the sale of the land, under the order of the surrogate, was void as to the plaintiffs unless a guardian was actually appointed for the infants Adula and Clinton. (*Bloom and others* v. *Burdick*, 1 *Hill*, 130. *Schneider* v. *McFarland*, 2 *Comst.* 459.) It was claimed, however, by the defendant's counsel, that the *onus*, as to the appointment of guardians, was upon the plaintiffs, and he relied upon the act of 1850 as producing this result. Prior to that act the *onus* would have been upon the defendant, who claimed a title through the proceedings before the surrogate, and the sale. The act referred to is entitled "An act for the protection of purchasers of real estate upon sales by order of surrogates." (*Sess. Laws of* 1850, *ch.* 82.) By the first section of this act it is declared, that "Every sale heretofore made, or hereafter to be made, under any of the provisions of the fourth title of chapter six, of the second part of the revised statutes, and of the acts amending the same, or in addition thereto, shall be deemed and held to be valid and effectual as if made by order of a court having original general jurisdiction, and the title of any purchaser at any such sale, made in good faith, shall not be impeached or invalidated by reason of any omission, error, default or irregularity in the proceedings before the surrogate, or by any allegation of want of jurisdiction on the part of such surrogate, except for the manner and for the causes that the same could be impeached or invalidated in case such sale had been made pursuant to the order of a court of original general jurisdiction."

If this act is applicable to the case, and is not unconstitutional, it is not denied that it embraces the present case. The

coc .sel for the plaintiffs insisted that the act is by its terms restricted to sales made under the provisions of the revised statutes; and that as the sale in this case was prior (in 1829) to the enactment of the revised statute, and under the revised laws of 1813, the statute does not apply. Secondly, that if it should be held that the statute applies, then it changes vested rights, and is unconstitutional; that it cannot have any retrospective operation.

In my opinion, neither of these positions is sound. Although the case may not be within the letter of the act, I think it is within its spirit. By the revised laws the surrogate was directed "to appoint some discreet and substantial freeholder a guardian for such infant or infants, for the sole purpose of appearing for and taking care of the interest of such infant in the proceedings." (1 *R. Laws*, 454, § 31.) The provision in the revised statutes is substantially the same. (2 *R. S.* 100, § 3.) The revised laws were continued, substantially, in the revised statutes relating to the sale of the real estate of deceased persons for the payment of their debts. The proceedings under the revised laws were substantially the same as under the revised statutes; and in my opinion the legislature, by the act of 1850, intended to include all sales theretofore made The act is remedial, and should be liberally construed. By the law, as settled in this state, it was incumbent upon the party claiming title, under a sale ordered by the surrogate, to show that the surrogate had jurisdiction of the subject matter and of the persons whose interests were to be affected. Thus it would be necessary for him to show, affirmatively, that a guardian was appointed for the infant heir. If the proceedings were "in a court having original general jurisdiction," it would be presumed that all the jurisdictional steps were taken, and that the proceedings were regular and proper, and the *onus* of showing the contrary was upon the party who sought to impeach the title acquired under the order for the sale. The act of 1850 is entitled "An act for the protection of purchasers of real estate upon sales by orders of surrogates;" "every sale heretofore made, or hereafter to be made, under any of the provisions of

the fourth title of chapter six of the second part of the revised statutes," &c. Now these provisions are the same, substantially, as the provisions of the revised laws, under which the sale in this case was actually made, and I think the statute of 1850 should be construed as including all previous sales made pursuant to the provisions of the original act, and which provisions are contained in the revision of such act. The leading rule in the construction of statutes is to ascertain the intention of the legislature enacting the statute, and the intention being ascertained, the law is known, and the will of the legislature must be carried into effect. Again, it is a rule of construction that a thing within the intention of the statute is as much within the statute as if it were within the *letter* of the statute. (*The People* v. *The Utica Ins. Co.* 15 *John.* 358. *Jackson* v. *Collins*, 3 *Cowen*, 89.) In *Schneider* v. *McFarland*, (2 *Comst.* 459,) the proceedings were in a surrogate's court, and it did not appear that any guardian was appointed for the infants. The proceedings were under the revised laws of 1813. The case was decided in October, 1849, and the legislature, at its next session, passed the act of 1850. I have no doubt the legislature intended to include all sales theretofore made. The result is, that the *onus probandi* was upon the plaintiffs, to show that no guardian was appointed. It was claimed by the defendant's counsel, that some evidence was given tending to show that a guardian was appointed, which should have been submitted to the jury. It is not necessary to pass upon this question now, as there must be a new trial. The plaintiffs also claimed that there were other defects in the proceedings, or rather that there was no evidence to prove certain facts which were necessary to show the jurisdiction of the surrogate and sustain the proceedings. I think they are wrong in point of fact as to some of the defects pointed out. But if I am right in the construction given to the statute of 1850, it will include all the errors or defects referred to by the counsel, so far as to call upon the plaintiff to show affirmatively that the acts alleged to have been committed were in fact omitted.

In my opinion the act of 1850 is not unconstitutional as ap-

plied to cases of sale made before the passage of the act. It has not attempted to, and does not, impair or change any vested right. If in fact no guardian was appointed, the plaintiffs will recover the land. The statute has changed in certain cases and under certain circumstances, a rule of evidence which had been applied to surrogates' courts; and it has made the rule in this court the same as it has always existed in courts of original general jurisdiction. I think it was competent for the legislature to do this in reference to proceedings previously had in surrogates' courts. (*See* 7 *Barb.* 429.)

There must be a new trial; costs to abide the event.

[Erie General Term, January 12, 1857. *Mullett, Greene* and *Marvin*, Justices.]

Griswold and Green *vs.* Fowler and others.

24 135
5L 57
9h 552
10h 2
42a 102
42a 105
42a 150

Where, upon the sale of a piece of land, the purchaser gives a mortgage thereon, to the vendor, for a part of the purchase money, which mortgage describes the land as a single lot or tract, and the mortgagor subsequently runs streets through the land and lays it out in blocks and lots, with the design of selling them for village or town purposes, and causes a map thereof to be made, and sells some of the lots, a judgment creditor of the mortgagor upon a foreclosure of the mortgage, has no right to insist that the mortgagee shall sell the premises in lots, according to the map, instead of selling the whole as one undivided tract, by the description contained in the mortgage.

Nor will the court direct the premises to be sold in parcels, in such a case, as a favor, or on terms, where it appears that the mortgagees have offered to consent to a sale in parcels upon the giving of security against loss thereon, to the amount of only one third of their debt.

By the terms of a mortgage the whole of the mortgaged premises are pledged for the payment of the mortgage debt; and the contract of the parties is that, in case of non-payment, the whole shall be sold. The mortgagor, therefore, cannot, by laying out the mortgaged premises into town lots, bounded upon and intersected by streets, withdraw from the lien of the mortgage the land included in the streets.

Griswold *v.* Fowler.

APPEAL from an order made at a special term, denying the motion of Peter Cagger, that the plaintiffs and referee sell the mortgaged premises, in parcels, according to a map made by the mortgagor.

L. K. Miller, for the respondents.

J. Van Buren, for the appellant.

BIRDSEYE, J. The plaintiffs sold and conveyed to the defendant Fowler a tract of land on Staten Island, containing thirty-five acres and one-quarter, and took back from him a mortgage upon the same premises to secure a portion of the purchase money. The mortgage describes the land as a single lot or tract. Subsequently to the giving the mortgage, Fowler proceeded to run streets through the land, and laid it out in blocks and lots, with the design of selling it for village or town purposes. He caused a map of these subdivisions to be made; and has, it would seem, sold some of the lots laid down on it; although there are several streets designated on the map, on which no lots have been sold. John O. Sales was a creditor of Fowler, the mortgagor, by a judgment recovered after the date and recording of the mortgage, and, as such, was made a defendant in this action. After the decree in this case, that judgment was assigned to Cagger, who then moved at special term for an order requiring the plaintiff and the referee to make the sale of the mortgaged premises under the decree, in lots according to the map made by Fowler. Several affidavits were read on the motion, from persons who stated that they were acquainted with the mortgaged premises, and that, in their opinions, the same would bring more if sold in lots than if sold in one parcel. The motion was denied; but by the consent of the mortagees, a sale was to be had in parcels, provided the moving party should secure the payment of any deficiency which might arise upon the sale, if made in lots, according to the map. From this order Cagger appeals. In the case of *Lamberson* v. *Marvin*, (8 *Barb.* 9,) it was held that where

lands are mortgaged as one undivided tract, and they are subsequently cut up into lots, for the convenient occupation of the mortgagor, or for the purposes of a sale, the mortgagee, upon a foreclosure of the mortgage under the statute, is not bound to advertise or sell in parcels; but may sell the whole premises as one undivided tract or lot, by the description contained in the mortgage. The court added (page 12) that in such a case as was then before it, equity alone could protect the rights of purchasers of separate parcels of the premises, if, indeed, they had any rights as against the mortgagee, except to pay the mortgage, and to be subrogated to his rights against the mortgagor and the residue of the mortgaged premises, which the court said was doubtful. The rule there laid down related only to the validity of a sale of mortgaged premises thus made in gross. And the present application does not proceed upon the ground that a sale in gross, under the judgment in this action, would be invalid; but that it would be injurious to the interests of the appellant as a junior incumbrancer upon the mortgaged premises. That case, however, shows that a sale of the mortgaged premises by the same description under which they are mortgaged, is a good sale, in a statute foreclosure. It was admitted on the argument that the rule is the same on a judicial sale. But it was contended that this was a proper case for the court to interfere, and upon the facts shown on the motion, to modify the general rule and direct the sale to be made in parcels. The questions presented for decision, then, are whether the appellant has a right to compel the sale to be made in the manner stated in his notice of motion, and if not, whether, as a favor or on terms, the court should, upon the facts appearing on this motion, grant this application. Both questions, however, may be, and will be considered together.

There are several distinctions to be noted between the facts presented in *Lamberson* v. *Marvin*, and those appearing here. There the mortgaged premises had been sold to various persons, according to the subdivisions, on which houses had been built, which were occupied by the subsequent purchasers. The appellant here is a mere incumbrancer by judgment, upon the

equity of redemption. He has merely a lien upon the premises or their proceeds, but has no specific interest in one part of the lands more than another, or in any part of them. If there be any purchasers of parts of the premises, subsequent and subject to the mortgage, they have not thought their equities sufficient to warrant an application to the court.

But a much more important distinction is this: In that case the whole of the premises, as mortgaged, were embraced in the lots as subdivided, and would be embraced in the sale if made in parcels. Here, a very considerable portion of the mortgaged premises had been laid out into streets by the mortgagor since he gave the mortgage now being foreclosed; those streets are designated on the map, according to which it is asked that the sale be made; and if the application is granted, the mortgagees will be absolutely deprived of that portion of the mortgaged premises; they will be prevented from subjecting it to the payment of their mortgage debt. By the mortgage under which this sale is to be had, the whole of the mortgaged premises, as well as the parts now laid out in streets as the residue, were pledged for the payment of the mortgage debt. The lien of the mortgage may be discharged by payment of the mortgage debt, or by the consent of the mortgagee. If there be any other method of removing it, I have yet to learn that fact. If the mortgagee can be deprived of that portion of the mortgaged premises, now laid out into streets, which from the map would seem to be about one-tenth of the whole, why may he not be of a still larger fraction? Why may not the streets be doubled in number and in width? and what is the limit of the amount which the mortgagee can be compelled to give up in this manner? If the mortgagor, by laying out streets, can withdraw from the lien of the mortgage a part of the premises, can he take another part for a park or public place—another for a school and another for a church? And if, on the equity of one party, he must relinquish a portion of his security, shall he surrender another portion on the equity of another? And this surrender is to be made, not for his own benefit, or for the purpose of paying his own debt, but on the motion of a remote incumbrancer, for the purpose of raising a

surplus to be paid over to him. Nothing of that kind can be done. The contract of the parties was, that in case of non-payment the whole of the land should be sold. No court has any power to alter or impair that contract, in any particular, or to direct that only a part of the land shall be sold, and the rest shall be given away, or dedicated to the public.

It is no answer to this reasoning, to say that several witnesses for the appellant give it as their opinion that a sale in parcels would be more advantageous than a sale in gross, and that on the part of the plaintiffs, only one witness gives a different opinion. Some of the witnesses for the appellant say, in their judgment, a sale in parcels would bring sufficient to pay the amount due on the decree; while the witness for the plaintiffs states his belief (a belief which seems founded on very satisfactory reasons) that it would not. All this, however, is mere useless speculation; for nothing but the sale itself will disclose what sum will be realized on the sale. The rights of the mortgagee are absolute and sacred. It is true he holds the land only as security for the payment of his debt; and when that is paid, he has no interest in the premises. If the present application was based on any such offer as the payment of the debt, it would be entitled to the favorable consideration of the court. It is the right of the mortgagee, under his contract, either to have his whole mortgage debt paid, or to have the whole of the mortgaged premises exposed for sale in order to pay it; and when thus exposed for sale, if others do not bid to the amount due him, he has a right to buy in the premises, and the whole of them, in satisfaction of his debt.

Strangers may think, as the appellant and his witnesses seem to do in this case, that it is better for the mortgagee to give away one-tenth of the mortgaged premises, for the purpose of enhancing the value of the residue. Every mortgagee who deems that to be for his interest, will doubtless take that course with his own property. But neither the appellant nor this court can compel other persons to take or to act upon such view, or can judge for the plaintiffs what would best promote their interests. For even if the stranger would give more, at the

sale, for nine-tenths of the premises, laid out in lots, than for the whole land undivided, it by no means follows that the mortgagee would do the same. And, as already said, I think the mortgagee has a clear right to have the whole of the mortgaged premises exposed for sale, and to bid upon them to the full amount of his debt; and in case the money is not otherwise made, then to take back the entirety of the property pledged for the payment of his debt. It may be urged, however, that this interference with the vested rights of the plaintiffs is more apparent than real, and that by proper provisions in the terms of sale, any such interference may be prevented. Is this so? The sale in parcels can be had only in one of two ways; the one is, by selling the property in lots, but expressly reserving and providing in the terms of sale, that if, by a sale of the several lots, the amount due on the decree be not realized, then that the referee proceed to sell that part which on the map is designated for streets, disencumbered of any dedication of the same for streets. No court would ever order any such sale as that to be made; for no person would buy a lot, if he was liable to be deprived of all access to it by these streets, in case of a failure to raise the whole amount of the debt by a sale of the separate lots. Such a provision would enable the mortgagees to buy the whole land in separate parcels at their own prices. Besides, would any such reservation be effectual? Would not the purchaser of one of these lots, if the plaintiffs should purchase the surrounding premises, be entitled to a way of necessity over them, that he may have access to his land, and derive some benefit from it? (*See Holmes* v. *Seely*, 19 *Wend.* 509, 510, *and cases there cited.*) The doubt that might exist on that point, is a sufficient reason for not directing any such sale to be made. The other method of conducting the sale would be by omitting to make any such reservation of the right to sell the streets and make good any deficiency. If that reservation was not made, but the map was expressly referred to and made a part of the conditions of sale, and of the conveyances to the purchasers, then it is clear the plaintiffs

would lose the right to sell the whole premises, however necessary that part of the mortgaged premises might be to complete the satifaction of their debt; and if all reference to the map were omitted from the terms of sale, it is by no means clear that the same result would not follow. At any rate, these relative rights and equities of the purchasers of some of these lots, and of the plaintiffs as purchasers of the residue, and of the streets, would be such as to prevent this court from interfering, as we are now asked to do by the appellant, if we have any discretion to exercise upon the subject.

If it be objected that this is giving an undue advantage to the mortgagee, or is harsh to his debtor, it is a sufficient answer to say, such is the contract the parties have made. If valid, the court must enforce it. There our power ends.

It may be that this is one of a not unfrequent class of cases where the party who has fallen into difficulty from want of sufficient care to protect his own rights in the bargain, has appealed to the law, unsuccessfully, for redress. The hardship of such cases has never yet induced the court to make new bargains for the parties, to assume powers which it does not possess, or to do acts which are contrary to the dictates of justice, or the obligations of law.

It is not intended to intimate that in this instance there is any wish or design on the part of the plaintiffs, to take an unfair advantage, or to prevent the mortgaged property from being sold to what they honestly believe the best advantage. I am abundantly satisfied that their conduct here negatives any such suspicion. For they consented to waive the pre-payment of their whole debt, to which they would have been entitled in case of an ordinary subrogation of another person in their stead, and on being secured against any loss by a sale in parcels, to permit the sale to be made in that manner. When it is considered that the mortgage debt is now upwards of $60,000, and that the appellant seeks to compel them to raise that sum by the sale, in separate parcels, of vacant lots on Staten Island, I think they have done far more than in equity could have been

required of them, in offering to take security to the amount of only one-third of their debt against loss from a sale in parcels. The order appealed from must be affirmed, with $10 costs.

EMOTT, J., concurred.

MITCHELL, P. J., dissented.

Order affirmed.(*a*)

[KINGS GENERAL TERM, March 5, 1857. *Mitchell*, *Birdseye* and *Emott*, Justices.]

(*a*) An appeal from this decision was taken to the court of appeals, which appeal was dismissed at the April term, 1857.

POWERS and others *vs.* BARR and others.

Where land, situated within the bounds of any city or village, in which several persons are interested, is ordered by the supreme court to be sold, under and in pursuance of the act of May 26, 1841, "to authorize the sale of real estate in certain cases, to pay assessments" &c., or under the act of April 12, 1855, "to provide for the due apportionment of taxes and assessments, and for the sale of real estate to pay the same," one parcel taxed or assessed may be sold by the referee, to satisfy a tax or assessment on a different parcel.

The power of sale conferred by the statute, in such cases, is for a special and limited purpose, that of either paying the taxes, before a sale for taxes takes place, or of redeeming from such a sale after it has been made, or both. When these purpose have been subserved—when the taxes and assessments have been paid and satisfied—the power of sale is gone. The remaining land, therefore, cannot be sold, though it may be deemed by the referee, or by all the parties, to be more advantageous to convert the land into money than to retain the same unsold.

No extra allowance can be made in proceedings under those statutes.

CASE submitted for the opinion of the court, under the code. The questions submitted arose under the act of the legislature, entitled "An act to authorize the sale of real estate

in certain cases to pay assessments, and for other purposes," passed May 26, 1841; (*Laws of* 1841, *ch.* 341. 2 *R. S. 4th ed.*, *p.* 353, § 45, &c.;) and the act entitled "An act to provide for the due apportionment of taxes and assessments, and for the sale of real estate to pay the same," passed April 12, 1855; (*Laws of* 1855, *ch.* 327, *p.* 537;) and were as follows:

1. Can any parcel, taxed or assessed, be sold, under the judgment of the court, to satisfy a tax or assessment on a different or other parcel?

2. After enough has been sold to satisfy taxes or assessments, can the land remaining unsold, be sold under the judgment, if it should be deemed by the referee more advantageous to the parties to convert the same into money, than to retain the same unsold?

3. Can an extra allowance be made in proceedings under that act?

John A. Lott, for the plaintiffs.

———— ————, for the defendants.

BIRDSEYE, J. It is evident upon a comparison of the two statutes, that the first section of chapter 321, of the laws of 1855, (*p.* 537,) is a revision of the first section of chapter 341 of the laws of 1841. It would seem to be designed as a substitute for it. The enumeration of the cases in which the action to apportion or satisfy taxes or assessments may be brought, is much more full; the nature of the conflicting interests upon which the taxes or assessments are to be charged, is much more precise. And all the provisions in regard to instituting the proceedings and granting relief, are not only adapted to the present course and practice of the courts, but are made much more definite and clear; although the grant of power in the two statutes is in substance the same. It is not necessary now to inquire whether the later statute operates as a repeal of the prior one, as all the questions submitted in this case arise as

well upon one statute as the other. My examination will, therefore, be confined to the act of 1855.

I am of opinion that the first question presented must be answered in the affirmative. This will follow from an analysis of the section. It provides, in substance, and laying aside unnecessary particulars, that where there are several persons interested in any real estate situated in any city or village in the state, and such real estate has been sold, or is liable to be sold, to satisfy any tax or assessment imposed thereon, then, upon an action brought by any person interested in the real estate, for the purpose of apportioning the tax on the several interests &c., this court have certain powers, which are prescribed. These are : 1. To extend the time of redemption of any such real estate sold for the taxes, &c., to a period not exceeding six months from the entry of final judgment in the action. 2. To order a sale in fee simple absolute, *of such real estate*, or *any part or parts thereof*. This sale may be ordered, for the purpose, first, of paying *such tax or assessment*, or 2d, of redeeming the real estate or any part thereof. The court have also power to direct the proceeds of the sale to be applied to the payment of such tax or assessment, or to the redemption of the real estate sold therefor, after defraying the costs and expenses of the action. The court have, therefore, the power to sell either the whole real estate, or any part or parts thereof. This power is of course to be exercised with reference to the circumstances of each case, and so as best to protect and promote the interests of the parties concerned in the property.

When this sale takes place, whether it be of the whole real estate, or only of some part or parts thereof, it is, in the language of the statute, "to pay such tax or assessment," that is, for the purpose of paying such tax or assessment. The tax or assessment which is thus to be paid is the one previously mentioned in the section, and there stated to be "any tax or assessment imposed" on any real estate wherein several persons are interested in the manner defined in the statute. So the court may direct any part to be sold in fee, for the purpose of redeeming either the whole real estate thus jointly owned, or any part

thereof, which may have been sold by the authority of the city, for the taxes. While the power of the court to order a sale in fee, extends to the whole or any part of the real estate, the power is given of applying the proceeds of the sale, either to the payment of the taxes on the whole of the real estate, or to the redemption either of the whole or of any part of the real estate which may have been sold by the city for the taxes.

To illustrate. It is my opinion that if several persons are interested in ten dwelling houses and lots in a city—some owning estates in possession, and some in reversion or remainder, and some on the happening of contingencies—and if all the houses are subject to taxes or to assessments, or to both, for which they are liable to be sold for a term of years; and if one or more of the houses have in fact been sold for a term of years by the authority of the city, for the purpose of satisfying such taxes or assessments as have been imposed upon that particular house or houses; then, in an action like the present, the court may order a sale of all the houses, if that be necessary, and if it be not, then of so many of them as may be necessary to pay all the taxes and assessments imposed on all the houses, and to redeem as many of them as may have been sold for the taxes or assessments by the authority of the city. The sale may be of any of the houses, which it will be the most for the good of the several persons interested therein to sell. If it should happen that the parties in interest have different shares or estates in different parcels of the land, then another and more difficult question may be presented. I do not understand that it arises in the present case. It will be time enough to decide it, when it does necessarily arise.

What has been already said, answers substantially the second inquiry. The power of sale conferred by the statute is for a special and limited purpose; that of either paying the taxes, before a sale for taxes, or of redeeming from such a sale after it has been made, or both. When these purposes have been subserved—when the taxes and assessments have been paid and satisfied—then the power of sale is gone. The remaining land cannot be sold, though it may be deemed by the referee, or by

all the parties, more advantageous to convert the land into money, than to retain the same unsold.

The statutes in regard to actions for partition have provided for nearly every possible case of that kind. If they have not, then the legislature must be asked to intervene again. For it seems to me clear that they intended in the act in question only to provide, as is stated in its title, "for the due apportionment of taxes and assessments, and for the sale of real estate to pay the same."

3. I do not see how any allowance can be made under §§ 308 and 309 of the code, in an action under this act. The action is not for the partition of real property. The proceedings are not to compel the determination of claims to real property. (*Bridges* v. *Miller*, 2 *Duer*, 683.) The action bears some analogy to one brought for the foreclosure of a mortgage. It is brought to foreclose a lien. The case may also very well be, as this seems to be, both difficult and extraordinary. But the controlling reason why there can be no allowance is that there is no claim or recovery, upon the amount of which the allowance can be calculated. The lien or incumbrance which is foreclosed is not held by the plaintiff, but by a stranger. Neither party to the action recovers a judgment against the other, within the meaning of the code; of course neither party can have the allowance created by the code.

It seems to be a hardship that in a case involving so much labor as this has done, the party who has necessarily employed the attorney should recover only the specific costs fixed by the code. But that is a consideration for the legislature, not for the courts. It is better that such rare and infrequent hardships should be borne, till the legislature provide a remedy, than for the court to seek to provide that remedy by harsh or strained constructions of the law, or by the exercise of doubtful powers.

[Kings Special Term, March 23, 1857. *Birdseye*, Justice.]

KETCHAM and others *vs.* WOODRUFF, executor, &c.

24 147
39h 217

The power of the supreme court to review or vacate an award made under a submission pursuant to the statute, (2 *R. S.* 541, § 1,) is limited to that conferred by the plain words of the statute. The award is final in every case where there has not been either misbehavior or mistake, on the part of the arbitrators.

Thus where parties submitted a controversy to arbitration, by a submission which provided that a judgment of the supreme court should be rendered upon the award, and the arbitrator made his award in favor of the plaintiffs, and judgment was entered thereon; and the defendant made no motion to vacate or modify the award for any of the causes specified in the statute, but appealed from the judgment; *it was held* that he could not review the award upon the merits, by serving a case which stated the testimony before the arbitrator, and his decisions thereon, and the defendant's exceptions thereto. All the testimony and the proceedings had before the arbitrator, at the hearing, were accordingly struck out.

THE parties submitted a controversy existing between them to arbitration; and in the submission provided, pursuant to statute, (2 *R. S.* 541, § 1,) that a judgment of this court should be rendered upon the award made pursuant to such submission. The arbitrator made his award in favor of the plaintiffs, and judgment was entered up thereon in their favor, at a special term of the court held in Dutchess county. The defendant made no motion to vacate or modify the award for any of the causes specified in the 10th and 11th sections of the statute respecting arbitrations, (2 *R. S.* 542.) But he appealed from the judgment rendered at special term, to the general term; and he served a "case," stating the testimony before the arbitrator, (who, in it, was called the referee,) and his decisions thereon, and the defendant's exceptions to such decisions, in the same manner as if he were moving to review the report of a referee appointed by the court in an action, pursuant to the code of procedure, and the rules of the court. The plaintiffs proposed as an amendment to the case, to strike out every thing but the judgment roll; that is, all the testimony and proceedings had before the arbitrator at the hearing.

C. W. Sandford, for the defendant.

Geo. G. Reynolds, for the plaintiffs.

BIRDSEYE, J. The statute of 9 and 10 William 3d, ch. 15, which was substantially enacted in our state, by the act of February 28, 1791, (1 *R. L.* 125,) declared that the parties to an arbitration might provide in their submission, that it should be made a rule of court; and that the performance of the award might be enforced by attachment where the submission was made a rule of court; unless it should be made to appear on oath, to such court, that the arbitrators or umpire *misbehaved* themselves, or that such award, arbitration or umpirage was procured by *corruption* or other *undue* means. Prior to these statutes, awards were not examinable into in a court of law, at all; and even in case of corruption, relief could be sought only in equity. And after the statutes the power of a court of law was held only to extend to those submissions which were made a rule of court under the act. (*See Emmet* v. *Hoyt*, 17 *Wend.* 413, *and authorities there cited.*) The principle of these decisions was clear. The parties having chosen judges of their own, and agreed to abide by their decision, were held to their agreement, and compelled to perform the award. When the statute authorized the successful party to resort to the court for aid in enforcing obedience to the award, instead of relying upon the tedious and difficult remedy of action on the submission and award, the court were by statute vested with power to set aside any arbitration or umpirage, procured by corruption or undue means. The power of the court was derived solely from the statute, and it was uniformly held to be limited to that conferred by the plain words of the statute. Nothing but corruption or gross partiality would justify the court in interfering. (3 *John.* 369. 9 *id.* 212.)

The provisions of the 10th and 11th sections of the statute respecting arbitrations, somewhat enlarged the powers of the court in which judgment was to be entered upon the award. But the terms of these sections, and the notes of the revisers there

on, show that it was intended only to confer a limited authority upon the courts; and to make the award final in every case where there was not either misbehavior or mistake. Such has been the uniform construction put upon the revised statutes by the courts.

In *Smith* v. *Cutler*, (10 *Wend.* 589,) it was held that the court could not intermeddle with an award of arbitrators on the merits, except to modify it where there is an evident miscalculation of figures, or mistake in the description of persons, &c.; that the court had no power to correct an *error in judgment* in the arbitrator, but only such misconduct and misbehavior as implied an intention to *do wrong*. And it was said that it could never have been the intention of the legislature that this court should sit in review upon the decisions of all the arbitrators in the state. The same views were expressed in *Emmet* v. *Hoyt*, (*ubi supra*,) and the decision of arbitrators was held to be conclusive, as well in respect to questions of *law* as questions of *fact*.

The present application, it is conceded, is an attempt to review the decision of the arbitrator upon the merits. It does not proceed upon the ground of any misconduct, misbehavior or mistake. The remedy sought is not open to the party. The revised statutes do indeed provide for reviewing by writ of error the judgment upon an award, (2 *R. S.* 543, §§ 16, 17;) and it would seem that the present appeal is substituted for the old writ of error, where such a review is now sought. (*Code*, § 323.) For the proceeding by judgment upon an award was a special proceeding in a *civil case*. (*See the title to part* 3 *of the Revised Statutes*, 2 *R. S.* 164, *and the title to ch.* 8, *of part* 3 *of ditto*, 2 *R. S.* 444.) And the "civil case" of the third part of the revised statutes has, no doubt, now become the "action" described in subdivision 1, of section 1 of the code.

But upon the writ of error provided by the revised statutes, nothing could be reviewed except the decision of the court upon the application to vacate or modify the award. The statute clearly contemplates this, when in § 17 it provides, that when any writ of error shall be brought on such a judgment, certi-

fied copies of the original affidavits upon which any application in relation to such award was founded, and of all other papers relating to such application, shall be annexed to, and form a part of, and be returned with, the record of the judgment. The court to which the writ of error, (or, now,) the appeal shall be returned, is then to examine the decision made upon the application to vacate or modify the award. If the motion below was to vacate the award, and the appellate court sees that there was misconduct or misbehavior, the judgment will be reversed; otherwise it will be affirmed. If the application below was to modify or correct the award, and the appellate court perceives that there has been an evident mistake in a calculation or description; or that the award has fallen short or exceeded the submission, the judgment may be modified or amended, according to justice.

The defendant's proceeding in the present case for the purpose of reviewing the award of the arbitrator, is unauthorized by law, and the amendment proposed must be allowed, and the statement of the testimony before the abitrator, and his decisions thereon, and the exceptions thereto, must be stricken out.

[Kings Special Term, March 23, 1857. *Birdseye*, Justice.]

---

24 150
7h 494

Voorhies *vs.* Voorhies and others.

Before suit can be brought by an individual to recover the possession of lands conveyed by him during his infancy, he must make an entry upon the lands and execute a second deed to a third person; or do some other act of equal notoriety in disaffirmance of the first deed, such as demanding possession, or giving notice of an intention not to be bound by the first deed.

Under the present system of pleading, this act of disaffirmance must be averred in the complaint, and is necessary to be proved.

The conveyance of an infant will not be ratified by a bare recognition of it, or a silent acquiescence in it, for any time less than the period of statutory limitation.

If it appears from the complaint that the plaintiff has suffered twenty years after he arrived at his majority to pass by before bringing suit to recover possessio.

of land conveyed by him during infancy, *it seems* this is an objection to be taken advantage of by answer, and not by demurrer.

Where an infant conveys one tract of land by deed to one person, and another tract by a separate deed to another person, and the latter has granted portions of the land purchased by him to several purchasers, the infant, after becoming of age, cannot bring a joint action against both of his grantees and against the purchasers from one of such grantees, to recover possession of the premises.

DEMURRER to complaint. The complaint alleged that heretofore, to wit, about the year 1831, Jacobus I. Voorhies, of the town of Gravesend, Kings county, died intestate, leaving him surviving five children, viz. John I. Voorhies, Jacobus I. Voorhies, William Voorhies, Barnardus Voorhies and Stephen I. Voorhies, the plaintiff in this action, his only children and heirs at law. The plaintiff further alleged, that at the time of the decease of his father he was of the age of fifteen years "or *thereabouts*," and as one of the heirs of his father, he was entitled to, and became possessed of, the one equal undivided fifth part of certain premises described in the complaint; that as such infant he had no guardian, and that on or about the first day of February, 1834, he, the plaintiff, being then young and inexperienced, of *about* the age of nineteen years, and having no guardian, or other person, to direct or advise him, he, in consideration of the sum of $2100, joined with his brothers in two separate deeds of conveyance, by which he conveyed to his brother Barnardus, one of the defendants, his one equal undivided fifth part of the premises described in the complaint as parcel No. 1, and to his brother William, another of the defendants, his one equal undivided fifth part of parcel No. 2, which said deeds were recorded in the register's office of the county of Kings, on the 8th of February, 1854. The plaintiff alleged that his share of the premises so conveyed was worth a great deal more than what he received, and as he was informed and believed his share of the said two parcels was worth at least the sum of $16,000. That Barnardus Voorhies was still in possession of said parcel No. 1, but that William Voorhies, the other grantee, had since sold portions of parcel No. 2 to John Vanderbilt, William Grevel, Jacobus I. Voorhies, Patrick McElroy

and James McIlvany, the other defendants. The plaintiff further alleged that he had not at any time since he arrived at majority confirmed the sale of either of said parcels of land nor made any disposition of said two parcels of land, nor any part thereof, other than the two deeds above mentioned. And that the defendants are now in possession of the said real estate, claiming title thereto or some interest therein or lien thereupon, but unlawfully, as he, the plaintiff, submitted and insisted, and that they, the said defendants, unlawfully withhold possession from the plaintiff. He therefore asked that the said conveyances might be declared to be null and void as against him, and that he might be put in possession of his one equal undivided fifth part of said two parcels of land, upon his bringing into court the amount received by him, to wit, the sum of $2100, with legal interest, and that the defendants might be adjudged to pay to him, the plaintiff, damages for the unlawful withholding of the same in the sum of $10,000 besides the costs of this action; and for such other and further relief, &c.

To this complaint the defendants William Voorhies and Barnardus Voorhies demurred, on the grounds, 1. That it did not state facts sufficient to constitute a cause of action against them, or either of them; and 2. That several causes of action were improperly united. The other defendants also joined in a demurrer, assigning the same causes of demurrer as those above mentioned.

J. A. Lott, for the defendants.

H. B. Fenton, for the plaintiff.

BIRDSEYE, J. The conveyances made by the plaintiff during his infancy were merely voidable, not void. Such is now the decided weight of authority. (*See Bool* v. *Mix*, 17 *Wend.* 119; *Dominick* v. *Michael*, 4 *Sandf.* 418; 1 *Parsons on Con.* 243, 4, *note e;* 275, *n. l.*) It is also clear that before suit can be brought for the recovery of the possession of lands conveyed in infancy, the party must make an entry upon the lands and exe-

cute a second deed to a third person, or do some other act of equal notoriety in disaffirmance of the first deed, such as demanding possession or giving notice of an intention not to be bound by the first deed, or an action cannot be maintained. (*Bool* v. *Mix*, *supra*. *Dominick* v. *Michael*, 4 *Sandf*. 420, 1.) In the latter case it was said, as seems to be clearly correct upon principle, that under the present system of pleading this act of disaffirmance must be averred, and is necessary to be proved. I think the want of this allegation makes the complaint fatally defective. The facts stated in the complaint show that the plaintiff's grantees have been in the undisturbed possession of the lands for upwards of twenty-two years. This possession has been *lawful*. Though the deeds were subject to avoidance after the plaintiff had attained full age, yet till such avoidance they were valid, and protected his grantees in the occupancy of the lands. It is unjust to permit their grantor to turn that lawful possession into a wrongful one, without any notice or demand whatever. Especially where, as in this case, it is averred that the plaintiff received and still keeps the full consideration for the land, as expressed in his deed, does it seem just that before commencing his action he should in some manner notify his grantee of his intention not to abide by the deed. It would seem now settled that the conveyances of an infant are not ratified by a bare recognition of them, or a silent acquiescence in them, for any period less than the period of statutory limitation. (*Parsons on Cont.* 273, *n. i.*) The criticism of the defendants' counsel, that from the great looseness of the allegations of the complaint respecting the plaintiff's age, it may well be that the period of limitation had gone by, since the plaintiff became of age, is well taken. But though from the frame of the complaint it may be that the plaintiff had suffered twenty years of his majority to pass by, before bringing suit, still it may be otherwise. That fact is only left in doubt. It does not clearly appear either way. And if it did, I apprehend that it is an objection to be taken advantage of by answer, and not by demurrer.

The second ground of demurrer is also well taken, I think. The infant conveyed one tract of land by one deed to one per-

son, and by a separate deed conveyed another tract to another person: the latter has granted portions of the land purchased by him to five other persons. And the plaintiff now brings this action against both of his grantees, and against the five purchasers from one of those grantees. The two conveyances were entirely separate and distinct. There is no warrant for bringing one action to avoid them both together; for the facts as to the ratification or avoidance of them might be equally distinct. Whether or not one action could be maintained against the one grantee and the subsequent purchasers from him, on the ground that the suit is substantially for a *redemption* of the premises, and that all these parties are entitled to share in the consideration money to be paid back by the plaintiff, and must therefore be before the court, so that their rights to the money may be settled, I am of opinion that inasmuch as the deeds of the infant were distinct, one action cannot be maintained against both grantees to avoid the deeds and recover back the lands.

Judgment must be rendered for the defendants on the demurrer, with costs. And, upon the facts of this case, it would seem that no leave to amend should be granted. It would be unavailing. And were not that so, the action is one that deserves no favor at the hands of the court.

[Kings Special Term, March 23, 1857. *Birdseye*, Justice.]

---

24 154
42 40
17h 567
54a 463

Winfield *vs.* Bacon and Comstock.

A receiver, who has obtained authority from the court to sue, is not only authorized but bound to proceed with his action, and he is not to be restrained by injunction out of another court, or by making him a party to a new action and obtaining an injunction against him.

The proper method of restraining him when engaged in the discharge of his official trust, is by application to the court whose officer he is, for instructions.

As a general rule, a defendant who has an equitable defense to an action, being now authorized to set it up by answer, is bound to do so, and he will not be

permitted to bring a separate action merely for the purpose of restraining the prosecution of another action pending in the same court.

Nor can one court, in this state, rightfully enjoin a defendant from proceeding in a suit in another court of the state, having equal power to grant the relief sought by the complaint.

A receiver, having a fund in his hands, realized from a sale of land, to which there are two claimants, each of whom has commenced a separate action against him in respect to that fund, and obtained an injunction to prevent him from paying it over, may bring an action, in the nature of a bill of interpleader, against the rival claimants, to compel them to interplead and settle their rights between themselves.

MOTION, by the defendant Comstock, to dissolve an injunction. Early in 1853, an action was brought in this court, by Eckerson & Dominick, who were judgment creditors of Gottfried Vallmer, having an execution on their judgment returned unsatisfied, against Gottfried Vallmer, and John A. Vallmer and his wife. Gottfried Vallmer did not answer in the action, but John A. Vallmer appeared and answered, and the cause was referred. The referee, after hearing the testimony, made his report, finding that Eckerson & Dimick were such judgment and execution creditors of Gottfried Vallmer. That Gottfried being, on the 30th of June, 1851, the owner of a farm of land in Deer Park, Orange county, on that day conveyed the same by deed, in which his wife united, to Samuel & John P. Fowler. That this deed was made for the purpose of securing an indebtedness of about $1000, then due from Gottfried to the Fowlers, and with an express agreement between the Fowlers and Gottfried, that on Gottfried's paying that indebtedness, the Fowlers should convey the premises to him or to any person whom he might appoint. That on the 21st of July, 1851, Samuel Fowler and wife and John P. Fowler conveyed said lands to John A. Vallmer, at the request of Gottfried Vallmer, and pursuant to the agreement so made between him and said Fowlers. That to secure the said debt so due to the Fowlers, John A. Vallmer, at the time of the conveyance of the farm, gave back his bond and a mortgage on the farm to said Fowlers for $1000, that being the amount of their debt; John Vallmer's wife joining in the mortgage. This mortgage has been assigned to the pres-

ent defendant, Daniel P. Bacon; and the action of Bacon hereinafter mentioned, was brought for the purpose of foreclosing that mortgage. The report further found as a fact, that Gottfried Vallmer procured John A. Vallmer to take, and John A. Vallmer did take the conveyance from the Fowlers, with the fraudulent purpose of hindering and delaying Gottfried Vallmer's creditors, in the collection of their just debts against him; that the lands were, at the time of the conveyance to John A. Vallmer, worth much more than the incumbrances then on the property, including the mortgage to the Fowlers. That John A. Vallmer, after the conveyance to him, entered into the possession, and received the rents, issues and profits thereof; that after taking possession, he paid a mortgage on the lands, subject to which they had been conveyed to the Fowlers and to him; and also made various repairs and permanent improvements on the premises; and that after deducting the rents and profits of the lands which he had received, there was still due to him on these accounts the sum of $2062.55, which he was entitled to have reimbursed to him. The report then proceeded to adjudge and determine that John A. Vallmer stood seised of the lands as trustee for the plaintiffs in that action, and other creditors of Gottfried Vallmer. That a receiver of the property be appointed, to whom John A. Vallmer and wife should convey the lands; that the receiver should sell the lands at public auction, and out of the proceeds pay, first, the costs and expenses of the sale, and his own fees and commissions; second, that he pay to said John A. Vallmer the said sum of $2062.55, being the balance due him for his advances in taking up the mortgage aforesaid and in making the improvements and repairs on the premises; that he take John A. Vallmer's receipt for the payment and file it with his final report; third, that he pay to the then plaintiffs, Eckerson and Dimmick, the amount of their judgment against Gottfried Vallmer, with their costs in that action; and that he bring the remainder of the money into court, and deposit it with the clerk of Orange county, to abide the order of the court.

At a special term held at Newburgh, on the 3d of July, 1854, this report was confirmed, and judgment in pursuance of its

findings and determinations was entered; the present plaintiff Charles H. Winfield, being in that judgment appointed the receiver of the lands in question. Pursuant to that judgment, and on the 20th of November, 1855, John A. Vallmer and wife conveyed the premises to Mr. Winfield as receiver; who, on the 19th of February, 1856, sold the lands under the judgment, at auction, for $3100. Before the receiver could pay over to John A. Vallmer the $2062.55, due to him under the judgment, one Boehringer, claiming to be a creditor of his, and to have an equitable lien on these moneys, applied to be made a party defendant in the suit of Eckerson *v.* Dimmick, and to obtain those moneys; and procured an order staying the payment by the receiver to John A. Vallmer of this sum of money. This stay was not terminated till the 8th of April, 1856, when the general term, upon appeal, affirmed an order made at special term, denying to Boehringer leave to come in, and dismissing his application.

On the 30th of March, 1856, Daniel P. Bacon, one of the defendants in this action, commenced an action to foreclose the mortgage for $1000, given by John A. Vallmer to Samuel and John P. Fowler, on their conveyance to him, in July, 1851, as above stated. In his complaint in this action, Bacon claimed to be the assignee of that mortgage; he made Winfield, the receiver, one of the defendants, and claimed to have the mortgage satisfied out of the moneys in his hands as receiver. He also prayed for an injunction to restrain the receiver from paying over any of the moneys awarded to John A. Vallmer, till his claim to the moneys upon his mortgage was passed upon. That injunction has been issued, and is still in force.

On the 8th of January, 1855, Benjamin W. Davis recovered a judgment in this court against John A. Vallmer for $356.89, on which an execution was issued and returned unsatisfied; and upon supplementary proceedings, Nathan Comstock, jun., the other defendant in the present suit, was appointed receiver of John A. Vallmer's property and effects. On the 14th of April, 1855, John Lutz also recovered a judgment against John A. Vallmer, for $810.44. Similar proceedings were had, and Mr.

Comstock was appointed receiver of the property and effects of Vallmer in that case, also. Thereupon Mr. Comstock, as such receiver, obtained leave of the court to sue, and in May, 1856, he brought an action against Mr. Winfield. In his complaint he set forth the proceedings by which he was appointed receiver of John A. Vallmer, and claimed to be vested, as such receiver, with all John A. Vallmer's rights. He then set forth the proceedings in the case of Eckerson *v.* Dimmick, the appointment of Mr. Winfield as receiver in that case, the sale of the farm and the receipt by Winfield of the price of it, $3100, of which $2062.55 was thus awarded to John A. Vallmer. The complaint then claimed judgment for this sum against Winfield, with costs, and prayed also for an injunction to restrain Winfield from paying over any portion of the moneys, during the pendency of the suit, or until the further order of the court. An injunction was issued in pursuance of that prayer, which was served on Mr. Winfield and was still in force. To this complaint of Comstock, Winfield answered, and the cause was at issue, undetermined. At this time Mr. Winfield became the actor, by commencing the present action against Bacon and Comstock. In his complaint he set forth, in substance, the facts above stated as to his own appointment and rights, and the claims and suits of Bacon and Comstock against him. He also stated that before the commencement of either of those suits, and by virtue of orders made in the original suit of Eckerson and Dimmick against the Vallmers allowing and directing him so to do, he made various payments to Eckerson and Dimmick, and their attorneys, for the costs and judgment in that action, and to some other persons as judgment creditors of John A. Vallmer. These payments amounted to about $1400, and there remained in his hands about $1700; which sum, or whatever upon a fair accounting should be found in his hands as receiver, he was ready and willing to dispose of, according to the direction of this court. He further stated that he was ignorant and had no means of ascertaining with safety to himself, whether the moneys in his hands as receiver, belonged to Bacon as assignee of the mortgage, or to Comstock as receiver; and that, being restrain

ed by injunction, upon the prayer of each of them, from paying any of the money to the other, he could not pay it to either of them, but he offered to pay the money into court, after deducting his fees, commissions and expenses, in order that the claimants might interplead and settle their claims among themselves; and he prayed that he might have the judgment of the court respecting the manner in which the moneys should be applied. After denying collusion with the defendants in bringing the suit, the complaint prayed for an injunction to restrain the defendants from taking any further proceedings against the plaintiff in their respective actions against him for the moneys, till the further order of the court; and that the defendants might interplead and settle their claims to the money between themselves; and the plaintiff offered to pay into court the balance in his hands as receiver, as soon as he could do so, in view of the orders of injunction which prevented him from parting with the money. There was also a prayer for general relief.

An order of injunction was granted according to this complaint. And the present motion was by the defendant Comstock to vacate that injunction, so that he might proceed with his suit against Winfield. The defendant Bacon was not brought before the court on this motion.

D. C. Kingsland, for the plaintiff.

T. J. Taylor and *S. Sanxay*, for the defendant Comstock.

Birdseye, J. It is doubtless true, as contended for the defendant Comstock, that he is the officer of the court; and generally, an officer of the court who has obtained authority from it to sue, is not only authorized but bound to proceed with his action, and is not to be restrained by injunction out of another court, or by making him a party to a new action, and obtaining an injunction against him. The proper method of restraining such an officer when engaged in the discharge of his official trust, is by application to the court whose officer he is, for instructions. (*See Van Rensselaer* v. *Emery*, 9 *How Pr. R*

138.) But that rule, instead of being a warrant for this motion, furnishes, rather, a complete answer to it. It was first violated when Comstock obtained his injunction against Winfield, instead of applying for instructions in the action in which Winfield was appointed, to direct the payment of the funds in his hands. That general rule protects Mr. Winfield as well as Mr. Comstock. It will be observed rather by sustaining than by dissolving the present injunction.

It is also true, as a general rule, that the defendant who has an *equitable* defense to an action, being now authorized to interpose it by answer, is bound so to do, and shall not be permitted to bring a separate action merely for the purpose of restraining the prosecution of another action pending in the same court. (*Foot* v. *Sprague*, 12 *How. Pr. R.* 355.) Nor can one court, in this state, rightfully enjoin a defendant from proceeding in a suit in another court of the state, having equal power to grant the relief sought by the complaint. (*Grant* v. *Quick*, 5 *Sand. S. C. R.* 612.)

It is no *defense* to the action of Comstock as receiver, against Winfield as receiver, that Bacon *claims* a large part of the moneys which Comstock sues for. To constitute a defense, it must appear that Bacon's claim is well founded; and Winfield does not know whether it is well founded or not. He is not bound to inquire; or, if he has satisfied himself of its correctness, to maintain it. The same remarks apply, *e converso*, to the action brought by Bacon; with this distinction, that Comstock's claim, if sustained, will take the whole of the money in the hands of Winfield, while Bacon's claim may be satisfied with less than the whole of it.

The ground upon which all the numerous decisions under the code have proceeded, in holding that a separate action shall not be brought merely to restrain the further prosecution of another action already pending in the same court, is plain. The court has already jurisdiction of the action and of the parties. The defendant may in his answer set forth all his equities, and may show himself entitled to any affirmative relief. And the court has received, in the code, such a grant of power as to be able

to dispose of the whole controversy, and do complete justice between the parties. It is by the test of these reasons that the question must be tried, which of these three suits shall be allowed to proceed, and which shall be suspended.

The action of *Eckerson and Dimmick* v. *Vallmer*, is obviously not the one in which the litigation is to be had. Neither Bacon nor Comstock is a party to it. And Winfield himself is not strictly a party to it, though appointed by the court its officer to carry the judgment into effect. Neither of the three parties can appropriately bring before the court the grounds of their claim. For there are no provisions for their pleading or interpleading in that action, or for bringing any issue to trial, if one were joined. That action has subserved the purpose for which it was instituted. The plaintiffs have established the fraud between their debtor and John A. Vallmer, and have secured the payment of their debt. It remains now, only to ascertain what funds are in the hands of the receiver appointed in that action. To do that, it is only necessary that he should pass his accounts. For it seems but right that the receiver, who was appointed only in that action, who was made the hand of the court, only to take charge of the property, which is subject to the order of the court therein, should be allowed, after having carried the judgment into effect as far as is possible, to settle his account and retire from the contest. He cannot be compelled to litigate without being entitled to be paid. If paid from the funds held by him, they are unnecessarily and improperly diminished. Besides, he may, in a litigation, incur expense, or perform labor, or subject himself to liability, for which he could scarcely be paid out of the fund, and yet which he ought not to be compelled to bear individually. His accounts, therefore, should be settled, and he should be discharged. Of course, as Bacon and Comstock have made claims to the fund he holds, they should be notified of the accounting, and would be entitled to a hearing, to show that his payments had not been made, or were not justified. When the balance in his hands has been duly ascertained and paid into court, one party who might be entitled to costs from the fund, is dismissed.

Shall the suit commenced by Bacon proceed, and the others be stopped? He claims only a portion of the moneys remaining in court, or with the receiver. His claim may be sustained, and satisfied, and still a portion of the moneys remain, the subject of future litigation. Besides: Comstock, the real party to the controversy, is not a party to that suit.

Shall the suit brought by Comstock as receiver proceed, to the exclusion of the others? His claim, if sustained, will take the whole of the money which remains. But Bacon is not a party to that suit. He may perhaps be brought in. But still the objection will remain that Winfield, as receiver, is unnecessarily and improperly retained as a defendant, and compelled to litigate. To require him to pass his accounts as receiver, upon the trial of the issue between Bacon and Comstock, upon their conflicting claims, is imposing upon him an unnecessary burden, and on the fund a useless expense. And yet, until his accounts are passed, he is not divested of his interest, and cannot be discharged from liability. That accounting, as already intimated, ought to be had as a proceeding in the suit wherein he was appointed. Such an accounting, however, cannot be had, and the money, it would seem, cannot be paid by him into court, till the injunctions procured by Bacon and by Comstock have been removed. To effect that, he must go on and litigate both those suits; either at his own expense, or at that of the fund. During all this time, he must retain an interest in the fund, to the extent of his fees and commissions as receiver, his costs of these various suits, and the payments he had made, out of the fund decreed to John A. Vallmer, before the suits were brought against him by Bacon and Comstock. He is, therefore, not indifferent and disinterested; but must have affirmative relief, not properly attainable in either of those actions, but in another. This being so, I think he is not in a situation to apply, under the last paragraph of the 122d section of the code, that either Bacon or Comstock be substituted in his place, in the action of the other, and that he be discharged from liability to either party, on paying the debt into court; ven if the case were

otherwise within the terms of that section, as to which no opinion need be expressed.

It would seem under these circumstances, that the appropriate remedy, if not the only escape from the labyrinth, was for Mr. Winfield to bring this action, in the nature of a bill of interpleader, to compel the rival claimants to interplead and settle their rights between themselves. In the mean time, he can proceed to render an account of his receivership in the suit in which he was appointed, giving due notice to all the parties in interest. The moneys found in his hands will be paid into court, to abide the litigation upon the interpleader. The party who shall be found to have asserted an unfounded claim may, if the nature of the case requires it, be visited with costs. And thus an end may be reached, of what has seemed likely to prove an endless controversy.

But to that end the injunction already granted to Mr. Winfield must stand, and the parties must be required to come in and interplead in this action. Of course, the present motion to dissolve the injunction must be denied. As it was unnecessarily made against an officer of the court, who has necessarily and successfully opposed it, I think he is entitled to the costs of opposing it, even though those costs are imposed upon another officer of the court.

Motion denied, with $10 costs.

[Kings Special Term, March 30, 1857. *Birdseye*, Justice.]

Samuel and others *v.* Berger and others.

B., a watch-maker, having acquired a reputation as such on account of the superior character of his watches, which were stamped with his name, sold to S. the right to stamp B.'s name on watches manufactured by S., and S. assigned to the plaintiffs the right to stamp B.'s name on watches made by them. The defendants had on hand, for sale, watches made by B. and stamped with his name. *Held* that an injunction would not lie to restrain them from selling the genuine article, and thus to protect the plaintiffs in selling the simulated.

Samuel *v.* Berger.

MOTION for an injunction. The complaint alleged that the plaintiffs were the assignees of Sylvester L. Samuel, who, by agreement with one Iberson Brindle, had acquired the right to use his name upon watches manufactured by Samuel or his assignees. The defendants sold watches manufactured by Brindle, and stamped with his name. It was sought to restrain them from so doing, by injunction.

D. D. Field, for the plaintiffs.

E. W. Stoughton, for the defendants.

DAVIES, J. The rule governing the interference of courts in this and like cases is well laid down by Duer, justice, in *Amoskeag Manufacturing Company* v. *Spear*, (2 *Sand.* 607.) He says: "At present it is sufficient to say, that in all cases where a trade-mark is imitated, the essence of the wrong consists in the sale of the goods of the manufacturer or vendor as those of another, and it is only when this false representation is directly or indirectly made, and only *to the extent in which it is made*, that the party who appeals to the justice of the court can have a title to relief."

Applying these principles to the facts in this case, we shall see, I think, that the plaintiffs invoke a rule of law which the defendants might claim to be applied to them, but which will not avail the plaintiffs. The plaintiffs say that Brindle, as a watch-maker, had acquired a reputation as such, and that all watches manufactured by him were stamped with his name. That Sylvester J. Samuel purchased from Brindle the right to stamp Brindle's name on watches manufactured by Samuel, and that Samuel assigned to the plaintiffs the right to stamp Brindle's name on watches manufactured by them. The defendants have on hand for sale the watches manufactured by Brindle and stamped with his name, and this court is called upon to restrain them by injunction from selling the genuine article, and thus to protect the plaintiffs in selling the simulated. The plaintiffs ask this court to aid them in passing off on the public watches

manufactured by them, and held out to the public as made by Brindle, when in truth the watches made by Brindle and stamped by him with his name are those which the defendants seek to sell. If the defendants were seeking to make sale of watches manufactured by them, as those manufactured by Brindle, and the right of the plaintiffs to use his name as a trade-mark was clear, then the injunction should go; but I think they cannot call on this court to aid them in passing off the watches made by them as those manufactured by Brindle.

Another rule enunciated by Judge Duer, in the case of the Amoskeag Manufacturing Company, above cited, is to be applied to this case. On page 618, he says: "The rule is fully settled, and is recognized in nearly all the cases, that, in suits of this nature, an injunction is never to be granted in the first instance, if the exclusive title of the plaintiff is denied, unless the grounds upon which it is denied are manifestly frivolous. When the title is disputed, the course is to let the motion for an injunction stand over until the plaintiff has established his legal right in an action at law." (*Partridge* v. *Menck*, 2 *Sand. Ch. R.* 622; *S. C.* 2 *Barb. Ch.* 101.) The case of *Motley* v. *Downman*, (3 *Myl. & Craig*, 1,) is an authority in point. The counsel in that case argued that the fraud, if any, was on the part of the plaintiffs, who persisted in using a name which designated tin plates, manufactured at particular works, after they had ceased to occupy the same, and had removed to a distance of over forty miles, and had established other works. Lord Chancellor Cottenham thought the right so doubtful that he refused the injunction. I am satisfied from his examination of the cases on the subject of trade-marks, that in no case like the present has an injunction been issued, and to issue one in this case would be violating all the rules laid down in the books applicable thereto.

When the power of the court has been invoked, it has been to restrain the defendant from making his goods and selling them as and for the goods manufactured by the plaintiffs, on the ground that such a fraud was an injury to the plaintiff and

tended to mislead and deceive the public. No such case is presented here, and the motion for injunction must be denied, with costs.

[New-York Special Term, December 6, 1856. *Davies*, Justice.]

The Colonial Life Assurance Company *vs.* The Board of Supervisors of the County of New York.

The statute having provided that if the president or other proper officer of a corporation named in an assessment roll shall show to the satisfaction of the board of supervisors, at their annual meeting, by affidavit, that such corporation is not in the receipt of any profits or income, the name of such corporation shall be stricken out of the assessment roll, and no tax shall be imposed upon it; and that the assessment of any corporation from which no such affidavit shall be received shall be *conclusive evidence* that such corporation was liable to taxation and was duly assessed, if the officers of a corporation whose property has been assessed, neglect to furnish the affidavit mentioned in the statute, at the proper time, a *mandamus* will not be issued, directing the supervisors to erase the name of the corporation from the assessment roll.

After taxes have been assessed, and warrants issued and delivered to the collectors, the supervisors have no further control over the assessment roll; their power being spent. Consequently a mandamus, directing them to strike any particular name from the roll, would be nugatory.

THIS was an application for a mandamus to the board of supervisors, to direct them to erase the name of the relators from the assessment rolls for the year 1856, and the amount assessed as and for their personal property.

J. Blunt, for the relators.

Martin V. B. Wilcoxson, for the defendants.

Davies, J. The grounds of this application are, that the tax commissioners of the city of New York have inserted the name of the relators in the assessment rolls for the year 1856, and have assessed them for personal estate in the sum of $100,000. This assessment roll has been returned to the supervisors of the county of New York, who have revised and corrected the

same, and estimated and assessed the tax the relators are to pay upon such assessment. For that purpose the supervisors have their annual meeting on the second Wednesday of July in each year. (*Davies' Laws*, 1003, § 23.) By section 27, same act, they must cause the corrected assessment roll with the warrant for the collection of the taxes assessed, to be delivered to the receiver of taxes on or before the first day of September thereafter. After the taxes are assessed, and warrants issued and delivered to the receiver of taxes, the supervisors have no further control over the assessment roll, and a mandamus to them to strike the relators' name from the roll, would be entirely nugatory. Their power is spent, and if the writ issued, and they were to obey it, it would not stay the receiver of taxes in the execution of the warrant. That a mandamus should not go under such circumstances, has been expressly held in two cases. (*The People* v. *Supervisors of Westchester*, 15 *Barb.* 607. *The People* v. *Supervisors of Greene County*, 12 *id.* 217.)

The well settled rule is recognized by these cases that a mandamus will not be granted when it would be unavailing, from a want of power in the defendants to perform the required duty. This is a prerogative writ, which the court may issue or withhold at discretion, and I have no doubt it would be improper to issue it in this case. The supervisors have the power, if they choose to exercise it, in case the application is made to them within six months after the tax rolls are delivered to the receiver of taxes, to remit or reduce any tax. This is entirely discretionary with them, and they are constituted the judges of the goodness of the cause shown. (*Davies' Laws*, 1003, § 28.) But it seems to me that the relators have a very serious obstacle to remove before they can be relieved of this tax. It is provided by 1 *R. S.* 416, § 9, that if the president or other proper officer of any corporation, named in any assessment roll, shall show to the satisfaction of the board of supervisors, at their annual meeting, within two days after the commencement thereof, by affidavit to be filed with the clerk of the board, that such corporation is not in the receipt of any profits or income, the name of such corporation *shall be stricken out* of the assessment roll, and *no*

tax shall be imposed upon it. And the assessment of any moneyed or stock corporation, authorized to make dividends on its capital, from which no such affidavit shall be received, shall be conclusive evidence that such corporation was liable to taxation, and was duly assessed. That life insurance companies are liable to taxation, whether incorporated on the mutual principle or otherwise, on the capital they have actually employed in business as the capital of the *corporation*, is now well settled. (*Mutual Ins. Co. of Buffalo* v. *Supervisors of Erie*, 4 *Coms.* 442. *Sun Mut. Ins. Co.* v. *Mayor of New York*, 4 *Seld.* 241. *The People ex rel. The Mutual Life Ins. Co.* v. *Board of Supervisors of New York*, 20 *Barb.* 81.) Now the statute has declared, in the most emphatic language, that if the affidavit is furnished, as required, the name of the corporation shall be erased from the assessment rolls, and no tax imposed upon it. If it be true, therefore, that this corporation, as is now alleged, at the time this assessment was made, was not in the receipt of any profits or income from the capital employed in its business in this state, then it was the duty of the proper officer of the corporation to have furnished such affidavit and had the name of the corporation struck from the assessment rolls. If such an affidavit had been furnished, and the supervisors had omitted to discharge their duty in the premises, a writ of mandamus would have been the proper remedy to compel its performance.

The statute also requires that this affidavit shall be furnished at the annual meeting, where these assessment rolls are revised and corrected, and the tax imposed, within two days after the commencement thereof. And this requirement is made for wise reasons. Taxes are laid for the support of the government, and it is the intention of the statutes in reference to this subject, that all real and personal estate, with few unimportant exceptions, shall be assessed, and that the taxes shall be equally imposed, on such assessments. To ascertain such real and personal estate and the value thereof, we have in this city assessors and tax commissioners, and when they have fully ascertained all such property liable to taxation, and the amount thereof, the assessment rolls are finally transmitted to the board of super

visors for correction and revision. They have no power to reduce or increase any valuation, or to add any property real or personal to the assessment rolls, or make deductions therefrom, except that given to them by this 9th section in reference to corporations making the affidavit, and that conferred by the 14th section in reference to companies authorized to commute their taxes. The reason for all this is, that a certain or ascertained sum is to be raised for the purposes of the government annually; and this has to be equally apportioned upon the assessed values, and the law intends that they shall be definitely ascertained before the apportionment of the tax is made. With all this caution and effort, assessments will be made which ought not to be made, and taxes will be assessed and apportioned which cannot be collected, and the result is, that such deficiencies have to be annually carried forward and added to the taxes of the succeeding year. But in reference to corporations assessed, the statute has declared in the most explicit language, that the assessment of any corporation from whom no such affidavit as mentioned above shall have been received, shall be conclusive evidence that such corporation was liable to taxation, and was duly assessed. This corporation were called upon, if they desired to escape taxation, to have furnished such an affidavit within the term prescribed by law; and not having done so, the statute declares in the most positive terms that the evidence of its liability to taxation and that it was duly assessed, is conclusive, and I am not at liberty to say that it is not. The court of appeals, in the case of the *Mutual Insurance Company of Buffalo* v. *Supervisors of Erie*, (4 *Comst.* 449,) affirm this doctrine in the broadest terms, and I am therefore precluded by the terms of the statute and the decision of the highest court of the state, from granting the relief sought for by the relators. The motion for a mandamus must be denied with costs; but if the relators desire it, the same direction or order will be made as by Judge Mitchell, in the case of *The People* v. *Board of Supervisors of New York*, (20 *Barb.* 86.)

[New York Special Term, December 14, 1856. *Davies*, Justice.]

SMITH *vs.* WRIGHT and others, commissioners of highways of the town of Kent.

24 170
27 621
47 42
50b 98
29a 306
34a 380

It is the duty of commissioners of highways to repair bridges, in all cases, when means are provided by law for that purpose.

The commissioners, if they have the means, or have the power of being supplied with the means, to repair the bridges in their town, and neglect to use and exercise the same, are liable for any injury which may result from their neglect of duty.

THE complaint charged that in May, 1854, the defendants were commissioners of highways of the town of Kent, in the county of Putnam. That it was their duty as such commissioners, to repair or cause to be repaired the bridges in said town, and the plaintiff averred that from the sources mentioned in the complaint the defendants had, or might have had ample and sufficient means to keep all the bridges in said town in repair. That in consequence of the neglect of the defendants to repair one of the bridges in said town, the same was rendered unfit and unsafe for travel, and the horse of the plaintiff, in crossing it, was injured to the amount of $150. To this complaint the defendants demurred.

G. Dean, for the plaintiff.

C. GaNun, for the defendants.

DAVIES, J. The defendants by their demurrer have admitted all the allegations of the complaint. The material ones to be considered for the present, are: 1. That it was the duty of the defendants to have repaired the bridge, at which the injury to the plaintiff occurred. 2. That the defendants had ample and sufficient funds for that purpose; or if they had not, it was through their neglect or default.

In reference to the first point there can be no doubt, that it was clearly the *duty* of the defendants to repair the bridge in question. This has been the recognized law of this state ever since the decision of the case of *Bartlett* v. *Crozier*, (17 *John.* 439.) This was an action against the overseers of highways

for injury caused by their omission to repair a bridge. Chancellor Kent, who delivered the opinion of the court, came to the conclusion that no action would lie against the overseers, because they act only under the orders of the commissioners, who alone are the responsible persons in respect to the repair of bridges. The statute gave them the care and superintendence of the highways and bridges; and *made it their duty* to cause them to be kept in repair. In that case he held that this duty did not exist absolutely, but only when the commissioners had money in hand arising from penalties and forfeitures, or which had been paid over to them under the direction of the supervisors; and inasmuch as the law had not supplied them with pecuniary means, nor armed them with the coercive power to meet and sustain so heavy a responsibility, an action would not lie against them.

In the case of *The People* v. *The Commissioners of highways of Hudson*, (7 *Wend.* 474,) the court quote from the opinion of Chancellor Kent, in *Bartlett* v. *Crozier*, as containing the true rule on the subject. That was an application for a mandamus to compel the defendants to build a bridge which would cost over $1400. The application was denied, for the reason that the only sum at the disposal of the commissioners in any one year was $250, for the repairs of all the highways and bridges in the town. The statute, it was remarked by the court, did not extend their duty beyond their means. This case clearly affirms the rule laid down in *Bartlett* v. *Crozier*, that it was their duty to repair to the extent of their means. The same point was ruled in *The People* v. *Adsit*, (2 *Hill*, 619,) which was an indictment against commissioners of highways for neglect of duty in not repairing a bridge. The indictment contained no averment that the defendants had funds or other means to defray the expense, and the court were of the opinion that the existence of the funds or other specific means, was a condition precedent to the obligation of commissioners of highways to repair bridges, and in the case of *Barker* v. *Loomis*, (6 *Hill*, 463,) it was held that commissioners of highways were

not bound to build or repair roads or bridges until the necessary funds were provided for that purpose.

I think therefore, that it may well be regarded as settled by these decisions, that in all cases the duty to repair is unquestionable when means are provided by law for that purpose. That the commissioners, if they have the means, or have the power of being supplied with the means, and neglect to use and exercise the same, are liable for any injury which may result from their neglect of duty.

But whatever doubt may have existed on this point, it seems to me that it has been removed by the two cases to which I shall now refer. In *Adsit* v. *Brady*, (4 *Hill*, 630,) the supreme court applied these principles. The defendant was a superintendent of repairs on the Erie canal, and the action was brought against him for damages sustained by the plaintiff in not keeping the canal in good repair, and removing obstructions to the navigation. The injury was caused by a sunken boat, which obstructed the navigation and rendered it unsafe, and had caused the plaintiff's boat to sink. The defendant demurred to the declaration, but the court decided that the superintendent was bound by statute to keep the section of the canal committed to his charge in repair, and that under the provisions of that statute, he had or *was in fault for not having* sufficient funds in his hands for that purpose, and that it was therefore his duty to repair without any unnecessary delay. The court say "when an individual sustains an injury by the misfeasance or nonfeasance of a public officer, who acts or omits to act, contrary to his duty, the law gives redress to the injured party by an action adapted to the nature of the case." This principle, the court said was well settled, and so well settled did it appear to them, that they did not adduce any authority to sustain it. There can be no doubt of this.

Applying these principles to the case now under considera tion, what is the unavoidable conclusion? None other than that the defendants are liable to the injured party as public officers. They admit by the demurrer either that they had ample and sufficient means for the repair of the bridge in ques-

tion in their hands, or that they were in fault for not having the same. In either case they are liable. I have not overlooked the distinction which the counsel for the defendants so ably and ingeniously undertook to draw between that case and the present, viz: that the plaintiff had a legal right to the use of the canal by paying toll therefor, and that therefore the defendant was liable, as in the case of a turnpike or railway. But the counsel must have seen that the case did not turn at all on that point. It was against a public officer for neglect of duty, and the court held him liable, because an injury had occurred, which he had the means, or might have had the means of preventing. The liability on the ground supposed by the counsel would have been complete, whether the owners of the canal, turnpike or rail road, or their agents, had the means or not to keep the same in repair. If they had not the means, the law compels them to provide the same, and for any injury arising from their negligence in any manner, creates the liability.

All the points arising in this case have been fully discussed and passed upon in the case of *Hutson* v. *The City of New York*, (5 *Sand. S. C. R.* 289.) The opinion of a majority of the court in that case has been affirmed by the court of appeals, and I must regard it as the law in this state. It will be observed that it was dissented from by one of the most learned and upright judges, who has ever occupied a place in the judiciary of the state, the late learned Justice Sandford, of whom it has been well said, that "we are at a loss whether most to admire—his deep and extensive learning as a lawyer, his diligence, probity and wisdom as a judge, his urbanity and refined sentiments as a man, or his piety and humility as a christian."

Judgment must be rendered for the plaintiff upon the demurrer in this cause, with liberty however, to the defendants, within twenty days after the service of notice of this judgment, to withdraw the demurrer, and answer the complaint on payment of costs.

[Dutchess Special Term, February 9, 1857. *Davies*, Justice.]

24 174
50b 122
24 174
24 666
32 582
35b 48
20a 197
37a 588
71a 44

WOLFE, executor of Vache, *vs.* HOWES and others.

The sickness or death of a party contracting to perform a particular personal service, is a legal excuse for the non-performance of the work, in a case where compensation is made dependent upon full performance.

In such a case the party, or his representatives, may recover upon the *quantum meruit, pro rata*, for the service actually performed.

THE plaintiff's testator and the defendants, on the 1st day of May, 1852, entered into a written agreement as follows: "Memorandum of an agreement made this day between Howes, Scofield & Co., of the first part, and Nicholas Vache of the second part, witnesseth, that for and in consideration of one dollar to me in hand paid, the receipt of which I do acknowledge, do agree on my part to do all the *pot room work* for the said parties of the first part, in a good and workmanlike maner, for one year from the date of this contract, at the price of $40 per month, ten dollars of which is to be paid me monthly. If extra help is needed, we agree to furnish it."

The defendants were glass manufacturers at the Dunbarton Glass Works, Oneida county. Vache was a manufacturer of pots to melt glass in; he entered into the employment of the defendants, under the agreement, on or about the 1st of May, 1852, and continued until the 7th of December following, when he became sick and incapable of further performance. He died in May, 1853. This action was brought by his executor for the work and labor performed between the said 1st of May and 7th of December.

The cause was tried before a referee, who reported in favor of the plaintiff for the work and labor at the price stipulated in the contract. The defendant Howes appealed from the judgment.

T. Jenkins, for the appellant.

F. Kernan, for the respondent.

By the Court, HUBBARD, P. J. The written agreement under which the labor was performed plainly contemplated the

personal service of the decedent. The pot room work in a glass establishment requires skill and experience. The decedent possessed these qualities, and for his personal service in that business the defendants engaged to give him $40 per month. It is apparent therefore, that the decedent could not have performed his contract by procurement, or in any manner except by his individual service. It is true that by the terms of the agreement, full performance of the year's labor is made a condition precedent to the payment of compensation, except the monthly installment of ten dollars. It is true, also, that this condition was not fulfilled, in consequence of sickness and death.

The important question to be considered is, whether this providential visitation is a legal excuse for the non-performance of the condition of the contract, so as to entitle the plaintiff to a recovery upon the *quantum meruit, pro rata*, for the work actually performed. In my judgment it is. The general rule of law upon the subject of conditions precedent is well settled, that full performance of an *entire contract* to do any particular service is essential to the payment of compensation, and that no recovery can be had for a part performance. (14 *Wend.* 257. 12 *John.* 165. 8 *Cowen*, 63. 19 *John.* 337.) This familiar doctrine is founded upon the just principle of requiring a strict fulfillment of positive and deliberate engagements, and implies some moral or legal fault or neglect. It is probably no excuse that the service which a party has undertaken to perform is impracticable in itself.

The case however, is essentially different, both in its legal and moral aspects, when the non-performance of an engagement for work and labor results from an *overruling cause*, such as *sickness or death*, when no fault or volition is imputable to the party. It would be extremely unjust in such a case to apply the severe and technical doctrine of precedent condition and cut off all compensation for the work actually done.

In my opinion, that doctrine has no application to such a case. When a contract for personal service is entered into, and com-

pensation is made dependent upon full performance, it must be presumed, in the absence of a contrary stipulation, that the parties impliedly contemplated a qualification of the condition with reference to the common *accidents and casualties* incident to human life, which might interrupt the performance of the service. In other words, that the condition should have no legal operation in the event that performance was prevented by a cause referrible to what is understood to be an *act of God*, without the fault of the contracting party.

This implied qualification of the condition is in harmony with the law as well established in a case where performance is prevented by the mandate or *act* of *the law*. In the case of *Jones* v. *Judd*, (4 *Comst.* 411,) it was held that when by the terms of a contract for work and labor, the full price is not to be paid until the work is completed, and complete performance becomes impossible by the act of the law, the contractor may recover for the work actually done, at the prices agreed upon. In that case, the defendants contracted with the state, to construct a section of the Genesee Valley Canal, and made a sub-contract with the plaintiffs, for a portion of the work, at so much per yard for excavation and embankment, payable monthly except ten per cent, which was not to be paid until the final estimate. Before the work was completed, the plaintiffs were stopped by the state officers, by virtue of an act of the legislature which suspended all work on the canal, and put an end to the defendants' contract from the state. By the terms of the contract on which the action was brought, full performance was expressly made a condition of the payment of the ten per cent. It was decided, however, upon equitable grounds, that inasmuch as performance was rendered impossible by the *act of the law*, beyond the control of the plaintiffs, a recovery might be had. (*See Comyn on Contracts*, 50 ; 10 *John.* 36.)

The principle of this decision is directly applicable to the case at bar. It is the same, in a legal sense, whether the disability arises from the *act of the law* or the *act of God.* In both cases alike, the contracting party is supposed not to be in

moral or legal default, but the victim rather of an overruling necessity.

The case of *Fahy* v. *North*, (19 *Barb.* 341,) is in point, holding that the sickness or other similar disability of the party, is an excuse for the non-performance of a contract for work and labor, and sustaining a recovery upon the *quantum meruit*. I fully concur in the soundness of that decision.

Upon the same theory of the law, it was held in *The People* v. *Manning*, (8 *Cowen*, 297,) that a condition in a recognizance is satisfied by a legal impossibility of performance, arising from the act of the law or of God. In that case the sheriff failed to appear upon his recognizance in consequence of sickness, from which he afterwards died. The action was defended on this ground. The decision was put upon the authority of *Co. Lit.* 206 *a*, where it is stated that "if a man be bound by a recognizance or bond with a condition that he shall appear at next term in such a court, and before the day the cognizee or obligor dieth, the recognizance or obligation is saved."

In the case of *Carpenter* v. *Stevens*, (12 *Wend.* 589,) it was held that where a living animal is taken by virtue of a writ of replevin and there is a judgment of *retorno habendo*, it is a good plea to an action on the replevin bond that the animal died without the default of the plaintiff in such suit.

The principle of all this class of cases is applicable to the point I am now considering. It must be held, therefore, upon authority as well as sound reason and justice, that the *sickness* or *death* of a party contracting to perform a particular personal service, is a legal excuse for the non-performance of the work, in a case where compensation is made dependent upon full performance; that in such case the party or his representative may recover upon the *quantum meruit*, *pro rata*, for the service actually rendered.

The complaint upon the *quantum meruit* was sufficient. It might have been expedient, although it was not necessary, to set forth the special contract, and the excuse for its breach. The contract and the excuse, however, might be shown under the common counts.

It was a question of fact which cannot be reviewed upon the weight of evidence, whether the decedent performed his work in an unskillful or negligent manner with reference to the value of his services.

The judgment must be affirmed.(*a*.)

[Jefferson General Term, April 7, 1857. *Hubbard, Bacon, Pratt* and *W. F. Allen*, Justices.]

(*a*) See opinion of Bacon, J., *post*, p. 666.

24 178
31 119
10h 155

Peck *vs.* Hiler.

An interruption of the enjoyment of a privilege conferred by a lease, by physical means adopted *by the landlord*, constitutes an eviction, and suspends the rent of the demised premises, and the remedy of the lessor, for the recovery of the possession.

Accordingly, where the use of a rail road, together with a rolling mill, furnace, &c., was leased to the defendant; such use being necessary to the full enjoyment of the premises; and rent was to be paid for such rail road, as an appurtenance of the other demised premises; and after the defendant had taken possession thereof, the lessor tore up the rails of the rail road, *it was held* that this amounted to an eviction of the tenant, which barred an action for the recovery of the possession of the premises on the ground of non-payment of rent.

Held also, that the fact of the tenant having recovered damages of the lessor, for the breach of the covenant for the use of the rail road, did not alter the case; the covenant being a continuing covenant.

Held further, that it being obvious, from the construction of the whole lease, according to its true meaning, that the use of the rail road was intended to be secured to the lessee, during the term, as a part of the demised premises, the fact that such use was granted in the form of a *covenant*, and separate from the formal demise, did not exclude the enjoyment of the rail road from forming a part of the demise.

THIS action was brought for the recovery of the possession of certain premises in Rockland county, which were demised to the defendant by the plaintiff. The complaint averred that rent for more than half a year was due and unpaid; that payment was demanded and refused, and that the plaintiff gave notice of his intention to re-enter within fifteen days, on ac-

count of the non-payment of said rent. The answer averred that the use of a certain rail road was demised as part of the demised premises, and that after the defendant had taken possession of the premises, the plaintiff evicted him from the use of the rail road and still held him evicted. The cause was tried before Justice BROWN, without a jury, in November, 1854, who rendered judgment in favor of the plaintiff. From this judgment the defendant appealed to the general term. The cause was argued in April, and was decided at the October term, before BROWN, P. J., STRONG and EMOTT, Js., when the judgment of the special term was reversed, and the following opinion was delivered.

"*By the Court*, EMOTT, J. This action is for the possession of certain demised premises, alleged by the plaintiff to have been forfeited by the non-payment of rent. The defense is, that the rent was suspended by the eviction of the tenant from a portion of the premises; and if this partial eviction be established, there is no doubt that the entire liability of the tenant for rent ceases until the interference of the landlord with the use of the property is terminated. The alleged eviction in this case consisted in the tearing up and removal of the rails upon a rail road running to the Hudson river, from the demised premises, which were a rolling mill and iron works in Rockland county.

The fact of the removal of the rails by the plaintiff is admitted, but two questions are raised: First, whether the use of the rail road was part of the demise; and, second, if it were, whether the tearing up of the rails constituted an eviction.

The use of this rail road is granted in the form of a covenant in the lease, and separately from the formal demise, it is true, but this does not exclude the enjoyment of this structure from forming a part of the demise. The instrument must be construed according to its true meaning, and not by strict technical rules, and it is sufficiently obvious that this interest in the rail road in question, or its use, was intended to be let and secured to the lessee during the term. It is granted in express, though

perhaps not formal, terms, to the tenant, as part of his lease · and though perhaps if it be considered as an incorporeal hereditament, a suit could not in strictness be said to issue out of it alone, yet when such an interest is demised with lands and a rent reserved, it is held to issue out of both in point of render, although out of the corporeal hereditament alone in point of remedy. So that where rent is nominally reserved out of two things, the one corporeal and the other incorporeal, and not apportioned, and the demise of the incorporeal hereditament is insufficient or invalid in form or substance, no rent at all is recoverable. (*See* 2 *Saund.* 303; 2 *B. & A.* 336; 2 *A. & E.* 696; 7 *Exch.* 685.)

In the case of *Watts* v. *Coffin*, (11 *John.* 495,) the court held that the covenant of the lessor, that the lessee should have common of estovers and common of pasture in part of the Rensselaer manor, to which the demised premises belonged, did not make these privileges part of the grant, or of the demised premises, out of which rent was reserved, but that they lay in covenant. But this was founded upon two sufficient reasons peculiar to that case, and which do not exist here. By the terms of the lease, in *Watts* v. *Coffin*, the rent was reserved expressly out of the lands granted, and was the yearly tenth of their produce, showing that these rights of common formed no portion of the premises out of which the rent was reserved to issue. And the court also advert to the fact, that the common mentioned in the covenant is appurtenant only, and capable of being created by grant as a separate interest or right, and not append ant to the estate created by the deed, which was a fee. Upon these arguments, applied to the construction of the conveyance, the court held that these rights of common formed no part of the grant. In *Etheridge* v. *Osborn*, (12 *Wend.* 529,) the lease contained a covenant that the landlord would dig and complete a raceway across the demised lands, to contain a given quantity of water, which the tenant was to be allowed to use. The defense was, that the raceway had never been built, and thus the tenant had lost its benefits. The court held, that as the tenant went into possession without and before the construc·

tion of this raceway, the landlord could not be said to have evicted the tenant from what had never existed, and the tenant must sue for damages, on his covenant. But it was admitted, that if the landlord, after the raceway had been dug and water let in, had diverted the water, it would have amounted to an eviction. The use of the race, and the water flowing in it, when made, was an essential part of the premises, and necessary to their full enjoyment. In *Tomlinson* v. *Day*, (2 *Brod. & Bing.* 680, the landlord stipulated that the tenant of a certain farm leased at a rent of £450, should enjoy a right of sporting over a manor, and it appearing that the landlord had no right to grant the privilege of sporting, it was held, that the right to shoot game formed part of the demise, and entered into the consideration for which the tenant became bound to pay rent, and that the fact that no such right passed, and the tenant was warned off, constituted an eviction.

In this case the use of the rail road in question unquestionably formed part of the inducement and consideration for which the defendant agreed to pay the stipulated rent, and was necessary to the full enjoyment of the premises as leased. How far the tenant considered this use of the railway in the bargain, or how important it was to the full and profitable use of the property in the business for which it was intended, is not material. It is enough that the court can see that it formed part of the premises and privileges which the tenant was to occupy and enjoy, that it was part of the estate granted, and intimately connected with the use of the land and buildings.

The next question is, whether the facts shown and admitted constitute in law a partial eviction, assuming this railway to have been part of the demise. Here I am constrained to differ with the learned judge who tried the cause. While upon the principles on which he places his decision, derived from the old precedents of pleading, it may be difficult to escape the force of his reasoning, yet these rules, and this construction of the pleas, has been expressly overruled and set aside by the more recent cases, and especially in the case of *Dyett* v. *Pendleton*, in the court of errors, (8 *Cowen*, 727.) It is no longer neces-

sary that there should be a manual or physical expulsion or exclusion from the premises, or any part of them, to constitute an eviction. Any intentional and injurious interference by the landlord, which deprives the tenant of the means or the power of beneficial enjoyment of any part of the demised premises is an eviction, under the authority of the cases in this state. The opinion of Chief Justice Nelson, in *Ogilvie* v. *Hull*, (5 *Hill*, 52,) which was cited to limit the application of the case of *Dyett* v. *Pendleton*, expressly recognizes this principle. And in *Cohen* v. *Dupont*, (1 *Sand. S. C. R.* 260,) the superior court of New York laid down and applied the same rule. The considerations derived from the forms and rules of pleading, by the learned judge who delivered the opinion in this case, were adverted to in the court of errors, in the case of *Dyett* v. *Pendleton*, and were not admitted to be sufficient to control the decision of the question. These cases, and the reasoning they contain, are, I think, decisive to show that the removal of the rails was an eviction of a portion of the premises demised in this case. It is well settled that an eviction, as to part of the demise, suspends the rent of the whole. (*See Lawrence* v. *French*, 25 *Wend.* 443.) And therefore the defendant here was not, at the time of bringing this action, under the obligation to pay the rent fixed by this lease, and it did not become forfeited by his failure.

The judgment should be reversed, and a new trial ordered with costs to abide the event."

On the 14th of November, 1856, an order was made in accordance with this opinion, directing a re-argument to be had, and the cause now came up pursuant to that order.

G. W. Stevens, for the appellant. I. In construing a deed or other written instrument, the intention of the parties must be gathered from the whole instrument, and that intention must govern in its construction. (*Stratton* v. *Pettit*, 30 *Eng. Law and Eq. Rep.* 479. *Oakley* v. *Adamson*, 8 *Bing.* 356.)

II. It was the intention of the parties, as it is to be gathered

from the lease, that the use of the rail road should pass to the defendant, equally with the use of the rolling mill.

III. The rail road passed to the plaintiff, under the lease, as an appurtenance to the principal matter demised, viz: the rolling mill. (2 *Crabb on Real Property*, 246, 247. *Pekes* v. *Grubb*, 21 *Penn. R.* [9 *Harris*,] 455. *Barlow* v. *Rhodes*, 1 *Cromp. & Mees.* 439.)

IV. The use of the rail road is specifically demised to the defendant, in and by the lease, and is coupled with, and forms part of, the demised premises. (*Woodf. Land. and Tenant*, 6, 147. *Taylor's Land. and Ten.* 10. 1 *Platt on Leases*, 24. 2 *id.* 23. *Anon.* 11 *Mod.* 42. *Newcomb* v. *Ketteltas*, 19 *Barb.* 608. *Doe dem. Smith* v. *Galloway*, 5 *Barn. & Ad.* 43. *Moore* v. *Miller*, 8 *Barr*, 272.)

V. The tearing up of the rails, as admitted by the stipulation, was an actual and not a mere constructive eviction of the defendant from the beneficial enjoyment of the rail road, expressly demised to him by the lease. (*Tomlinson* v. *Day*, 2 *Brod. & Bing.* 680. *Etheridge* v. *Osborn*, 12 *Wend.* 529. *Cohen* v. *Dupont*, 1 *Sand. S. C. R.* 260. *Upton* v. *Towsend*, *Upton* v. *Greenlees*, 33 *Eng. L. and Eq. Rep.* 212. *Briggs* v. *Hall*, 4 *Leigh*, 484.)

VI. An eviction of the tenant by the landlord, from a part of the demised premises, suspends the whole rent so long as the eviction shall continue. (1 *Roll. Abr.* 940, *n.* *Dyett* v. *Pendleton*, 8 *Cowen*, 727. *Lewis* v. *Payn*, 4 *Wend.* 423. *Lawrence* v. *French*, 25 *id.* 443. *Christopher* v. *Austin*, 1 *Kernan*, 216.)

VII. The recovery in the suit by the defendant against the plaintiff set up in the reply, is not a restoration of the possession of the road to the defendant, and cannot operate as a revival of the rent. (3 *Black. Com.* 220. 2 *Leon. pl.* 129. *Cro. Eliz.* 402. *Johnson* v. *Long*, 1 *Ld. Raym.* 370. *Fisher* v. *Barret*, 4 *Cush.* 381.)

Ferris & Frost, for the respondent. I. The rail road in question was no part of the thing demised, or with reference to

which any rent was reserved. The right to the use of this rail road rested upon a simple covenant totally disconnected with the general demise, and if the lessor had entirely deprived the lessee of the use of the rail road, it would not have amounted to an eviction, so as to have suspended the rent. (8 *Bac. Ab. tit. Rent, B. p.* 454, *id. D. p.* 462. *Watts* v. *Coffin*, 11 *John.* 495. *Fitchburg Manuf. Co.* v. *Melvin*, 5 *Mass. R.* 270, *note. Comyn's Land. and Ten. by Chilton*, 525. 3 *Kent's Com.* 460. *Winslow* v. *Henry*, 5 *Hill*, 481. *Capell* v. *Buzzard*, 3 *Yo. & Jervis*, 344. *Taylor's Land. and Ten.* 92. *Comyn's Dig. tit. Rent, B.* 3. 18 *Viner's Abr.* 472, 491, 492. *Mason* v. *Chambers, Cro. Jac.* 34.)

II. If the rail road in question had been a part of the thing demised, the act admitted to have been done by the lessor would not constitute an eviction; the admission being simply that the plaintiff directed the tearing up of the rails from the rail road mentioned in the pleadings in this action, in the month of April, 1853. (*Hunt* v. *Cope, Cowp.* 442. *Woodf. Land. and Ten.* 413. 1 *Saund. R.* 204, *n.* 2. *Lawrence* v. *French*, 25 *Wend.* 443. *Ogilvie* v. *Hull*, 5 *Hill*, 52. 3 *Kent*, 464. *Taylor's Land. and Ten.* 255. *McFadden* v. *Rippey*, 8 *Missouri R.* 738. *Roper* v. *Lloyd, T. Jones*, 148. *Harrison's case. Clayton's R.* 34. 18 *Viner's Ab. tit. Rent*, (*A a*,) *pl.* 11. *Chambers' Land. and Ten.* 591. *Bennett* v. *Bittle*, 4 *Rawle*, 343, 4.)

III. The occupation of the premises and the payment of rent accruing after the tearing up of the rails, with the knowledge by the lessee at the time of such payment that the rails had been so torn up, are acts entirely inconsistent with the defense set up. (*Crane* v. *Dresser*, 2 *Sand.* 120. 3 *Kel. R. p.* 520, *pl.* 87.)

IV. The lessee having brought an action upon the covenant in question, and recovered damages from the lessor for the tearing up of the rails in question, and a judgment thereon having been entered and paid, he cannot avail himself of the same acts to defeat the present action.

V. The putting the rail road in repair, above the Chemical Works, by the lessee, was a condition precedent to his right to

use it. The lessor reserved to himself important privileges in the mill in question, and it was for his interest that the rail road should be repaired, which fact together with the benefit which would accrue to him as the owner of the road, furnishes the consideration for granting to the lessee the use of the rail road.

S. B. STRONG, P. J. I assented to a re-argument of this case, as my associates had differed from each other, and from a supposition that I might have misinterpreted the authorities cited by Judge Emott in his opinion to which I had yielded my first impressions. On a re-examination, I have adhered to the opinion of a majority of the court, that the learned judge before whom the action was tried erred in rendering judgment for the plaintiff.

Taking the lease in its entirety—and that is the proper way to construe every instrument in writing—it demised the rolling mill, furnace and machinery, and the land under and immediately adjoining the mill, with the dwelling house formerly occupied by the Rev. Dr. Willard, the use of certain wire blocks or spindles, pullies, wheels and shafts, and the use of the rail road in common with others, including the lessor. The right to use and enjoy all such property passed to the defendant by the lease, and no part of it rested simply in covenant. The habendum included the premises previously described, *with the appurtenances*, and what was said afterwards, as to the right to use the rail road, may be considered as a specification of one of such appurtenances. If it had not acquired that character before, it might well have been created by the lease. (*Co. Litt.* 12 *b.* 1 *Ventr.* 40. *Com. Dig. tit. Appendant and Appurtenant, A.*) It is true the habendum clause could not enlarge the premises. (*Com. Dig. tit. Fait, E.*) But it may well refer to what is granted in any part of the conveyance. To say that it must refer exclusively to what precedes it would, in cases like the present, be sacrificing substance to form. The stipulation for the payment of rent, by the use of the word "therefore" shows that it was to be for all that had been described or referred to immediately before—both the premises and their appur-

tenances. It follows, then, that the use of the rail road was actually leased, and that rent was to be paid for it as an appurtenance. If so, what was said by Chief Justice Savage, in *Etheridge* v. *Osborn*, (12 *Wend.* 529,) is directly applicable. There the lessor had covenanted to construct a raceway, which the lessee was to have the privilege of using, but it was never made. It was decided that the use of the raceway had not been demised, for it had no existence when the lease was executed, nor in fact at any time. But it was remarked by the chief justice, that "had the landlord, after the raceway was dug and the water let in, and enjoyment by the tenant, subsequently diverted the water from the raceway, or a part of it, that, I think, would have amounted to an eviction within the cases of *Lewis* v. *Payn*, (4 *Wend.* 423,) and *Dyett* v. *Pendleton*, (8 *Cowen*, 727;) which last case, in the court of errors, carried the doctrine of eviction to the utmost verge." I have no difficulty in concurring in the opinion that an interruption to the enjoyment of a privilege conferred by a lease, by physical means adopted *by the landlord*, constitutes an eviction. If so, such eviction clearly suspended the rent for the whole, and more especially any remedy by the landlord, by reason of its non-payment.

It is no answer to this to say that the tenant has recovered damages for the breach of the covenant for the use of the railway. If it would in any case relieve the landlord from a penalty once incurred, it could not have that effect in the case of a continuing covenant. Here the tenant was to have the use of the rail road during the entire term. The landlord can only relieve himself as to the future by restoring the rails which he has wrongfully removed.

The judgment at the special term must be reversed, and there must be a new trial; costs to abide the event.

EMOTT, J. After attentively considering all which was cited and urged upon the re-argument of this cause in favor of sustaining the judgment, I adhere to the opinion expressed by me on the first hearing. With some slight modifications and additions which I have made, to meet suggestions which were

made on the re-argument, the opinion then delivered states the reasons for which I think there must be a new trial, and Mr. Justice BIRDSEYE concurs in the reasoning and conclusion of that opinion. We are unanimous that the judgment must be reversed, and a new trial ordered.

Judgment accordingly.

[DUTCHESS GENERAL TERM, April 14, 1857. *S. B. Strong*, *Emott* and *Birdseye*, Justices.]

---

24 187
3h 391

FERNANDO WOOD *vs.* SIMEON DRAPER and others.

The supreme court will grant its aid to restrain, by injunction, the imposition of any tax or burthen on the tax payers of a city contrary to law, on a complaint filed by any tax payer, on his own behalf as well as on behalf of others similarly interested; or on behalf of any corporator of the city, having an interest in the corporate property thereof, on a similar complaint, showing an illegal diversion or application of the corporate property.

But the plaintiff in such a case must aver that he files his complaint not only on his own behalf, but on behalf of all others similarly situated. Such an averment is essential to a complete determination of all the rights affected by the suit.

MOTION for an injunction. The facts are stated in the opinion of the court.

J. W. Edmonds, *T. Sedgwick* and *C. O'Conor*, for the plaintiff.

W. M. Evarts, *W. C. Noyes*, *D. D. Field* and *F. B. Cutting*, for the defendants.

DAVIES, J. This motion has been argued with an ability commensurate with its importance, and with the high standing at the bar of the distinguished counsel employed in the cause.

The plaintiff files his complaint in this cause, alleging there-

in that he is a tax payer in the city of New York, and one of the corporators thereof; and prays that the defendants may be restrained from the execution of a statute which he alleges to be unconstitutional and void. The relief demanded in the complaint, which it is competent for this court to grant in a proper case, is a perpetual injunction, restraining the defendants from the execution of the act. The authority for this court to interfere by way of preliminary injunction, is conferred by § 219 of the code. It authorizes the court, when it shall appear to it by the complaint that the plaintiff is entitled to the relief demanded, and that such relief, or any part thereof, consists in restraining the commission of any act, the commission of which during the litigation, would produce injury to the plaintiff, or where during the litigation it shall appear that the defendant is doing, or is about to do some act in violation of the plaintiff's rights, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. It is not granted, when the plaintiff is entitled to any relief, but to the relief demanded. If, by the law, as it stood before the code, the plaintiff had no right to the relief sought in a suit in his own name, he has now none, as the section does not profess to extend the relief which the plaintiff might claim in such a suit. If the only final relief which he demands is a judgment for an injunction, (as in this case,) he must show that, by the law as it stood before, he was entitled to that relief. (*Chemical Bank* v. *The Mayor*, *&c.* 12 *How. Pr. R.* 476.)

It is well settled in this court that when the plaintiff appears to be entitled to a decree for a perpetual injunction, he may also have a temporary injunction, *pendente lite*, provided it is necessary to protect him from injury. (*Corning* v. *Troy Iron and Nail Factory*, 6 *Pr. Rep.* 89.) The first question, therefore, to be disposed of is, has the plaintiff such a standing in this court as entitles him to the relief claimed in the complaint?

The plaintiff alleges, and it is not denied, that he is a tax payer in the city of New York, and a corporator thereof. The meaning and extent of this averment are, that he contributes to the taxes raised in this city, and is a member of the corporation

thereof, and as such is interested in the corporate property. By being a tax payer he has contributed to the taxes already raised and collected therein, and is liable to be assessed and to pay his aliquot part, by way of taxation, to liquidate and discharge any additional burthens which may be imposed upon the tax payers of said city. As a corporator, he is a part owner of all property, real and personal, owned by the corporation, and has a right to be heard in any disposition to be made of it.

The complaint sets forth the act of the legislature of this state, passed April 8, 1857, entitled "an act to establish a metropolitan police district, and to provide for the government thereof." This act organizes the counties of New York, Kings, Westchester and Richmond, into a district to be called "The Metropolitan Police District of the state of New York," and directs the appointment of five commissioners by the governor and senate, who, with the mayors of the cities of New York and Brooklyn, *ex officio*, are to form a board of police commissioners. Such board is authorized to appoint various officers, to aid them in preserving order and performing the duties imposed upon them by the said act, viz. a general superintendent of police, and two deputy superintendents; five surgeons of police, and so many inspectors or captains of police, not to exceed forty; so many sergeants of police, not to exceed one hundred and fifty, and so many police patrolmen, as may be determined on by the supervisors of the county of New York, as the patrol force of said county; and so many patrolmen for the city of Brooklyn and for the county of Kings, not included in said city, and for the counties of Westchester and Richmond as the common council of said city and boards of supervisors of said counties shall determine. Until otherwise provided, the existing police force in the cities of New York and Brooklyn will continue to be the police force of the counties of New York and Kings. By § 14 of said act, it is provided that the common councils of New York and Brooklyn, at the expense of said cities respectively, shall provide all necessary accommodations in said cities, for the station houses required by the board of police, for the accommodation of such police, for the lodging of vagrants, and the

temporary detention of persons arrested for offenses. It is also made the duty of said common councils to furnish the same suitably, and to warm and light the same by day and by night In case the said common councils, or either of them, shall refuse to make such provisions, having been requested so to do by said board of police, then it is made lawful for said board to make their own provisions in the premises, and the expense thereof shall become a proper charge and debt upon the city so neglecting or refusing.

By § 26 of said act, it is provided that the board of supervisors of the county of New York shall annually raise, by tax upon the real and personal property taxable in said county, such sums of money as the board of police, on or before the first Monday of June in each year shall apportion as requisite and needful to be raised by said city, which sums of money shall be applied by said board of police for the fiscal purposes of said act. Such apportionment not to be binding, if it shall exceed the sum necessary to maintain the police force in said counties respectively, nor unless the same shall be approved by a majority vote of an auditing committee, composed of the presidents of the boards of supervisors in each county in said district, and by the comptrollers of the cities of New York and Brooklyn. Such moneys, so to be raised, are to be paid into the treasury of said respective cities, and thereafter immediately paid into the treasury of the state, and to be drawn therefrom by the said board of police, for the purposes of said police. And by the said section it is further provided, that all the moneys collected by the said cities for police purposes, during the years 1856 and 1857, and not expended, shall, immediately on the organization of the said board of police, and on notice served on the comptrollers of said cities, be paid into the state treasury, to be disbursed by the said board of police. By § 15 of said act it is declared, that all telegraphic apparatus, public police property, books, records and accoutrements, in the possession of the police department of the city of New York, are thereby given for the use (and not to be removed from the county wherein now used,) of the board of police created by said act, but

the ownership of the same, and the use thereof, shall be according to the ordinances which the common council of the city, in which such property is situated, may enact.

It is thus seen that the said board of police have the authority to create a tax upon the citizens of New York, for the purposes of said act; the right created in case the common council of said city does not surrender to them the station houses, &c., now used by the police of said city, and refusing to keep the same warm, &c., to provide others at the expense of said city; to take out of the city treasury for the purposes of said board, any unexpended moneys raised therein for police purposes, for the years 1856 and 1857, at the date of the organization of said board, and apply and use the same for the purposes of said board; and to take possession of all telegraphic apparatus, public police property, books, &c., now used by the corporation of the city of New York, and the property of said corporation, and the use thereof is by this act given to said board.

Has the plaintiff, as a tax payer, any interest in these taxes to be levied, or in those already collected and now in the city treasury; or as a corporator, in said property to be taken and thus used? If I correctly apprehend the decisions of this court in several cases, he has an interest, and such a one as this court is bound to protect, if it shall see that the same is about to be illegally invaded.

The first case, in which the aid of this court was invoked by a tax payer to prevent a misapplication of moneys raised by taxation, or in the possession of the corporation, was that of *Adriance* v. *The Mayor*, reported 1 *Barb.* 19. In that case the plaintiff filed his bill, setting forth that he was the owner of real estate in this city, and a tax payer. He charged that among other misappropriations by the common council, they had directed the payment of moneys not authorized by law, and the complaint prayed a perpetual injunction, restraining the corporation from paying those sums. The bill was taken as confessed by the defendants. The court, though entertaining doubts of its jurisdiction, granted the injunction as prayed for. The next

case was in 1849, of Kirby and others, tax payers, against the corporation and certain committees of the common council, for an injunction, restraining them from purchasing a certain island in the East river called Berian's island, for a cemetery. The injunction in that case was granted and sustained. The next case which called for the judgment of this court, and settled this principle, was that of *Christopher and Tilton* v. *The Mayor of New York and others*, (13 *Barb.* 567.) In that case an injunction had been granted, on the application of the plaintiffs, who claimed the intervention of the court, on the ground that they were tax payers and freeholders in the city of New York. On their complaint an injunction was issued, restraining the corporation, and the comptroller, and the commissioners of repairs and supplies, from making and executing any contract with one John B. Corlies, in pursuance of a resolution of the board of aldermen, for rebuilding Washington market, and restraining the said Corlies, in case any such contract had been executed, from acting under the same. The case was very earnestly argued at the general term of this court, and it being the first instance, on a full discussion, in which its aid had been invoked by a tax payer, excited much attention, and received the careful examination of the court. The opinion of the court was delivered by Edwards, justice, who says: "It seems to me that when an act is clearly illegal, and when the necessary effect of such act will be to injure, or impose a burthen upon the property of any corporation, there is enough, according to every principle which has regulated the action of courts of equity, to warrant the interference of the court. * * * But, it is said that the plaintiffs have not such an interest as corporators, as will entitle them to the relief which they ask. It appears by the complaint, that they are tax payers and freeholders in the city. The necessary effect of the act complained of, will be to impose a burthen upon their real estate. Their interest, then, is as certain and direct, as that of a stockholder in a moneyed or other corporation." The order granting the injunction was affirmed. This case is so clearly analogous to the one now under consideration, as to the right of this plaintiff to invoke the aid of this

court, that I am unable to discover any essential difference. It is the law of this court, and by it I am bound, sitting at special term. Two cases were referred to by the court in its opinion, as sustaining the results at which it arrives. The first was that of *Bromley* v. *Smith*, (1 *Simons*, 8.) By act of parliament in the 40th Geo. 3, for enclosing and allotting certain waste lands, in the parish of St. Mary, in Stafford, over which the householders, being parishioners, within that borough, were entitled to rights of common, the occupiers of houses of the yearly value of £5 within the borough, or any seven or more of them, were empowered to meet at the times and places therein mentioned, for the purpose of making rules and regulations for the cultivation and management of the allotments, to appoint a treasurer and certain other officers, and to raise money by rates on such occupiers, for the purpose of carrying the rules and regulations into effect. The act was put in force soon after it was passed. In 1821, one Bagnall, who had been removed, for misconduct, from an office which he held under the act, obtained a verdict in an action for a libel, brought against the defendant Underwood, who was the then treasurer under the act, for damages and costs to the amount of £300. In March, 1852, Underwood resigned the treasurership, and the other defendant, Smith, succeeded him. Smith, out of money arising from the rates made pursuant to the act paid £107 15s. 1½d. to Underwood's attorney, in part discharge of the costs of the action. The bill was filed by nine persons who were householders, and parishioners within the borough of Stafford, on behalf of themselves and all other householders and parishioners within the borough, excepting Smith and Underwood; and after stating to the effect before mentioned, it alleged that the last mentioned payment was a misapplication of the rates; that the householders, being parishioners within the borough of Stafford, who were interested in the allotments, were very numerous, and that the plaintiffs were unable to make all of them parties to the suit. It prayed for an account of the rates received by the defendants, during their respective treasurerships, and that the balance remaining in their hands might be applied for the purposes of the act, and

that they might be decreed to replace what they had misapplied and restrained from further misapplying the moneys arising from the rates. Both of the defendants stated in their answer, that the action for a libel arose out of acts done by Underwood, in obedience to orders made by the householders present at certain meetings; and that the costs of the action also had been paid out of the rates, in obedience to orders made in like manner, and had been allowed the treasurer in passing his accounts, and that the majority of the householders were averse to the institution of this suit, and approved of the acts complained of in the bill. These statements were supported by evidence. For the plaintiff it was contended that the householders had no discretionary power as to the application of the rates; that they could apply them to no other purposes than those prescribed by the act; that by the misapplication complained of in the bill, all the householders were injured, as more money must necessarily be collected from them than would have been required for the purposes of the act, and that, therefore, any of them had a right to seek redress for the injury they had sustained. The defendant relied on the proceedings complained of having been sanctioned by the majority of the householders, and insisted that the plaintiffs had no right to institute this suit against the wishes of that majority, and that, if there had been any abuse, the only mode of redressing it was on information filed by the attorney general. The vice chancellor: "Where a matter is necessarily injurious to the common right, the majority of the persons interested can neither excuse the wrong nor deprive all other parties of their remedy by suit. The attorney general may file an information in a case like this, in respect of the public nature of the right; and the proceeding must be by the attorney general, when all persons interested are parties to the abuse; but when that is not the case, I am not aware of any principle or authority which makes it necessary that he should be before the court."

The other case referred to is that of *Gray* v. *Chaplin*, 2 *Sim. & Stu.* 267;) and sustains the same principles. This doctrine was again reviewed in this court in *Milhau* v. *Sharp*, (15

Barb. 193,) in which this court again held that the plaintiffs, being tax payers to a large amount, having such an interest in preventing the grant from the corporation, under consideration in that case, from being carried into effect, had a right to institute that suit in their own names, and that an injunction should issue to restrain it. The same subject was again carefully and elaborately reviewed in the case of *De Baun and Thistle* v. *The Mayor &c.*, (16 *Barb.* 392,) and the doctrine reaffirmed that a person owning real estate in the city of New York and paying taxes therein, may prosecute an action against the corporation, on behalf of himself and other tax paying citizens, to enjoin the corporation, or those acting under them, from expending the money raised by taxation, in repairing or paving a street in a manner contrary to an express law, and tending to add to the taxes of the inhabitants. The same point was ruled in *Stuyvesant* v. *Pearsall*, (15 *Barb.* 244.) See also, to the same point, *Roosevelt* v. *Varnum*, (12 *How. Pr. R.* 469.)

It must, therefore, be regarded as the settled law of this court, that it will grant its aid to restrain by injunction the imposition of any tax or burthen on the tax payers of this city contrary to law, on a complaint filed by any tax payer on his own behalf, as well as on behalf of others similarly interested, or on behalf of any corporator of said city having an interest in the corporate property thereof, on a similar complaint, showing an illegal diversion or application of the corporate property.

The next question which presents itself is, does this complaint show sufficient facts to bring the present plaintiff within the principle of these decisions? It will be observed, that in all these cases the plaintiffs claim the intervention of the court, as well on their own behalf as that of all others of like interest. Is this an essential averment? It is omitted from the present complaint, and the relief is only asked for by the plaintiff for himself alone.

The rule in reference to the proper and necessary parties is, that all must be made parties who have an interest in the result; and when a great many individuals are interested, the court

will often permit a few to represent the whole; but the bill should expressly state that it was filed as well on behalf of other members as of those who are really made complainants. (*Edwards on Parties, p.* 40.) One legatee may sue for his legacy, without naming the others interested in the same fund; but the plaintiff must sue as well on his own behalf as of all others similarly situated. (*Brown* v. *Ricketts*, 3 *John. Ch.* 553, *and cases there cited.*) In *Chancey* v. *May*, (*Pr. in Ch. Finch. ed.* 592,) a bill was brought by the then treasurer and manager of the Temple Mills Brass Works, in behalf of themselves and all other proprietors and partners in the first undertaking, except the defendants, who were the late treasurer and managers, being about thirteen in number; and it was to call them to an account for several misapplications, mismanagements and embezzlements of the copartnership property, in the South Sea times, to the value of £50,000 and upwards; the copartnership consisted originally of but 18 shares, but those 18 shares, in the year 1720, were split and divided into 800. The defendants demurred for that all the rest of the proprietors were not made parties, and so every one had the same right to call upon them to an account and then they might be harassed and perplexed with a multiplicity of suits; but the demurrer was disallowed, because it *was in behalf of themselves and all others, the proprietors of the same undertaking*, except the defendants, and so all the rest were in effect parties. (*See also Lloyd* v. *Loaring*, 6 *Ves. jun.* 773; *Cockburn* v. *Thompson*, 16 *Ves.* 321; *Cooper's Eq. Pl.* 40, 41; *Good* v. *Blewitt*, 13 *Ves. jun.* 397.) In this case the bill originally did not contain the allegation that the bill was in behalf of the plaintiff and all others, but leave was given to amend by introducing a statement that the bill was on behalf of the plaintiff and all others of similar interest. (*See also Smith* v. *Swormstedt*, 18 *How.* 288; *Brown* v. *Robertson*, *Id.* 480.) In *Leigh* v. *Thomas*, (2 *Ves. sen.* 312,) a demurrer to a bill, which omitted to state that it was filed on behalf of the plaintiff and the rest having similar interests, was sustained. In *Baldwin* v. *Law*

rence, (2 *Sim. & Stu.* 18,) the bill was dismissed, because it was not filed by the plaintiffs on behalf of themselves and all others equally interested with them. And in *Douglass* v. *Hasfall*, (*Id.* 184,) the vice chancellor sustained a demurrer and dismissed a bill on the ground that the bill ought to have been filed by some of them, on behalf of themselves and others. The rule is also well laid down in *Ling* v. *Young*, (2 *Sim. & Stu.* 385.) The case of *Macbride* v. *Lindsey*, (9 *Hare*, 574–585,) seems to be quite in point. Bill filed by plaintiff, as a shareholder in a company, against several defendants also shareholders; the plaintiff stating that there were others, and that he was ignorant of them, and that the defendants had refused to disclose their names. To this bill the defendants demurred. In support of the demurrer, it was alleged that that plaintiff's case was only that of every other member of the corporation who had sustained the same injury, and he could not sue alone. The vice chancellor says, "the case, therefore, is one in which the plaintiff, having a common interest in that point of view with the other parties who will be affected by the relief which he has prayed, and which he has prayed for himself exclusively. Now I am of opinion that he cannot obtain such relief, in the absence of the other parties who are interested in this concern. If he has a common interest with all the other partners in the concern, he must sue on behalf of himself and all those other partners." Demurrer allowed.

So also *Whitney* v. *Mayo*, (15 *Ill. Rep.* 251.) The court hold in that case, that "the general rule in equity is, that all persons materially interested in the subject matter of the suit, however numerous, must be made parties, plaintiffs or defendants. The case before us falls within the exception to the general rule, on account of number, and part being unknown. But the bill has not been framed to meet the exception. It should have been filed for and on behalf of all the other communicant members," and the decree dismissing the bill was affirmed.

The only case which I have been able to find, sustaining a doctrine, apparently adverse to this uniform current of decis-

ions, both in this country and in England, and the established practice in the court of chancery there and in our own courts, is that of *Dodge* v. *Woolsey*. (18 *How*. 321.) In that case, a bill was filed by a single stockholder of a bank, to restrain by an injunction, a tax collector of the state of Ohio, from the collection of a tax, on the ground that the law imposing it was unconstitutional and void. The circuit court of the United States granted the injunction, and the supreme court affirmed the order. The precise point now under consideration, does not seem to have arisen in that case, and it may, perhaps, be reconciled with the authorities before referred to. It would seem at first blush to conflict with them, but if it does, I am satisfied that the weight of authority is entirely with the proposition that a plaintiff who seeks the aid of a court of equity, in a case like the present, must aver that he files his complaint not only on his own behalf but that of all others similarly situated. Such an averment is essential to a complete determination of all the rights affected by the suit. As has been well observed, without it, the defendants might be subjected to a suit by every tax payer of the city of New York, while on a complaint with the necessary averments, a determination of the case would bind the plaintiff and all others having like rights and interests. Such at least has been the uniform averment in all similar complaints in like cases, entertained by this court, and I do not feel warranted, in this case, in departing from well established principles and authority.

In stating the conclusions to which I have arrived, I adopt the language of Lord Eldon in *Davis* v. *Fish*, reported in the appendix to Warren on Life Insurance, p. 128, "It must not be understood, from what I am about to say, that I give any opinion, whether the plaintiffs might or might not put such a case on the record, as would entitle them to a decree for the relief they seek. The question is, whether on an interlocutory motion, I can do what is asked. If I could not grant the decree as asked I cannot grant the injunction."

I am satisfied, from a careful examination of the complaint,

and the authorities referred to, that I could not make the decree asked for therein, and, consequently, it is my duty to refuse the injunction.

The motion for an injunction is, therefore, denied, and the order for a preliminary injunction vacated.

[New York Special Term, April 28, 1857. *Davies*, Justice.]

Berry, receiver, &c. *vs.* Yates and Porterfield.

24 199
127a 257

On the 8th of November, 1855, the board of trustees of the Atlas Mutual Insurance Company adopted a resolution "that a subscription in the sum of $400,000 in premium notes to be written against, be obtained; subscriptions to be binding when $300,000 is subscribed, *including the* $40,000 *already subscribed*." In pursuance of this resolution, the trustees prepared and circulated a paper, for signatures, in these words: "We the subscribers hereby agree to give to the Atlas Mutual Insurance Company our notes in advance of premiums of insurance, at six and twelve months, in equal amounts, for the sums set opposite our names respectively; it being understood that in consideration thereof the subscribers are to be allowed by the company, at the maturity of their notes, five per cent on the amount thereof. This subscription is towards the $400,000 subscription authorized by a resolution of the board of trustees of this date, and *is not to be binding until the sum of* $300,000 *is subscribed*." The defendants subscribed to this paper, $1000, on the 8th of November; and on the same day, the trustees subscribed the sum of $50,000 to another paper, on the same conditions set forth in the above resolution, to be paid in cash or notes, at 30, 60, 90 days or four months, provided the sum of $300,000 should be subscribed *under that resolution*. The subscriptions, under the resolution of November 8, exclusive of the $40,000 and the $50,000 subscriptions, amounted to only about $212,500. In an action to recover one half of the defendant's subscription, the plaintiff claiming that the whole $300,000 had been subscribed, so as to make the defendant's subscription binding;

Held, 1. That the several subscriptions must be deemed separate and independent engagements, varying in amounts, terms and conditions; and that neither the $40,000 nor the $50,000 subscriptions could be resorted to, to aid in fulfillment of the terms of that for $300,000, or as forming any part thereof.

2. That the resolution of the board of trustees, of November 8, declaring that the subscription was to be binding when $300,000 was subscribed, "*including the* $40,000 *already subscribed*," did not affect the rights of the defendants, or constitute any part of the contract. That the rights and liabilities of the defendants were limited and defined by the terms of their subscription, only.

3. That the condition mentioned in the subscription paper, that $300,000 should be subscribed, must be complied with before the defendants could be made liable upon their subscription; and that, as the whole sum specified was not subscribed, independent of the $40,000 and $50,000 subscriptions, the action would not lie.

4. That the fair construction of the paper signed by the defendants was, that the same was not to be operative unless the entire sum of $300,000 should be subscribed thereto, on the same terms as were therein expressed, viz: in premium notes at six and twelve months, in equal amounts.

A corporation, created for the purpose of engaging in the business of insurance, has no power to advance its moneys or obligations to sustain another corporation engaged in a similar or dissimilar business.

Accordingly *held*, that an insurance company was not authorized to subscribe to the capital stock of a mutual insurance company, and to agree to give its notes in advance for premiums on insurances to be subsequently effected.

The authority given to insurance companies, to reinsure policies or risks taken by them, in other companies, does not justify such subscriptions by them.

A subscription to the capital stock of an insurance company, made by a similar company, under an agreement between the two companies for a mutual exchange of notes to a specified amount, is void, as being a fraud upon the other subscribers.

THIS action was brought by the plaintiff, as receiver, to recover one-half of an alleged subscription of the defendants to the capital stock of the Atlas Insurance Company. That subscription bears date November 8, 1855, and was for $1000, payable in six and twelve months, less five per cent, and this suit was brought to recover the sum of $475, due thereon May 11, 1856. The complaint alleged that the Atlas Insurance Company was an incorporated insurance company on the mutual plan, organized and doing business in the city of New York, and became insolvent, and on the 11th of March, 1856, the plaintiff was appointed receiver of its property and effects. That in pursuance of a resolution of the board of directors of the company, the trustees thereof caused to be prepared, and circulated a subscription for signatures in the words following: "We, the subscribers hereto, agree to give to the Atlas Mutual Insurance Company, our notes in advance of premiums of insurance, at six and twelve months, in equal amounts for the sums set opposite our names respectively, it being understood, that in consideration thereof, the subscribers are to be allowed by the company

at the maturity of their notes, 5 per cent on the amount thereof. This subscription is towards the $400,000 subscription authorized by a resolution of the board of trustees of this date, and is not to be binding until the sum of $300,000 is subscribed. New York, Nov. 8, 1855." The resolution of Nov. 8, 1855, referred to in the subscription, was as follows: "On motion it was resolved, that a subscription in the sum of $400,000 in premium notes to be written against be obtained—subscriptions to be binding when $300,000 is subscribed, including the $40,000 already subscribed." On the 30th of October, 1855, the trustees adopted the following resolution: "That any arrangement made by the finance committee in paying or arranging for funds to pay the pressing liabilities of the Co., and to sustain the institution until other means can be provided, if they shall make themselves or their friends personally liable, the same shall be considered and treated as confidential in any event, *equal in all respects to the amount of* $40,000 *already subscribed by the friends of the company for its relief.*" The complaint further alleged that the defendants, on 8th November, 1855, subscribed to the said subscription the sum of $1000, and that the said sum of $300,000 was subscribed in accordance with the terms of said resolution, and of said subscription. The plaintiff further alleged that the defendants had not given their notes, in accordance with said subscription, and that there was due thereon the said sum of $475, and interest from May 11, 1856. The defendants in their answer denied that the said sum of $300,000 was ever subscribed in accordance with the terms of said resolution or of said subscription. The defendants further alleged, that said sum of $300,000 was never subscribed in good faith; that many of said subscriptions were merely nominal; that they were made with the understanding that they were not to be binding; that the officers of the company made subscriptions which were merely nominal, and made for the purpose of procuring from *bona fide* subscribers their notes in accordance with such subscription.

C. C. Egan, for the plaintiff.

Beebe, Dean & Donohue, for the defendants.

DAVIES, J. The terms of the subscription, and the testimony, conclusively establish the position that the subscription of the defendants was not to be binding unless the sum of $300,000 was actually subscribed. It was incumbent on the plaintiff, as essential to his right to recover, to establish the fulfillment of the condition precedent—that this sum had been subscribed; and for this purpose he produces and proves the subscription book, which contains first, a statement under date of Nov. 8, 1855, in these words: "The trustees of the Atlas Mutual Insurance Company, in order to show their desire and determination to place the company in an independent position, do subscribe the amount set opposite their names, on the same conditions set forth in the resolution of the board of this date, to be paid in cash or notes, at thirty, sixty, ninety days, or four months, provided that the amount of $300,000 is subscribed *under that resolution*." Then follows the names of sixteen persons, and opposite thereto $50,000. Next we have a copy of the subscription of $40,000, being that referred to, without doubt, in the resolution of October 30, 1855; and then succeeds the subscription of Nov. 8, 1855, already referred to, and which, in fact, only amounts to the sum of about $212,500. Then follows a subscription amounting to $48,000, by the gentlemen who had agreed to subscribe $50,000, provided the $300,000 subscription was made up, and then other subscriptions amounting to near $6000. The original subscription of $40,000 is produced, and bears date October 12, 1855. The subscription which the defendants signed, and the engagements which they entered into, contains the significant stipulation that "this subscription is not to be binding until the sum of $300,000 is subscribed." Now it is obvious from the date of the subscription of $40,000, and the terms of the engagement to subscribe $50,000, that they were both regarded as independent subscriptions to that for $300,000.

It is apparent to my mind, from the terms of the resolution of October 30, that an arrangement had been made that this $40,000 subscription was regarded as a confidential loan to the company. The notes to be given to meet it were, by the terms of the subscription, to be at four months, while those under the subscription for $300,000 were to be at six and twelve months, and those under the subscription of $50,000 were to be met in cash or notes, at thirty, sixty, ninety days, or four months. These subscriptions must, in my judgment, be all deemed separate and independent engagements, varying in amount, terms and conditions, and that neither the $40,000 or the $50,000 subscriptions can be invoked to aid in fulfillment of the terms of that for $300,000, or as forming any part thereof.

I have not overlooked the resolution of the board of trustees of Nov. 8, 1855, in which they say that the subscription is to be binding when $300,000 is subscribed, including the $40,000 already subscribed. It is sufficient to say that this is not the contract of the defendants. The terms of the subscription signed by them contain no such provisions, but the emphatic one that it is not to be binding until the sum of $300,000 is subscribed thereto. I am now considering the subscription of November 8, 1855, as containing what it purports, legal and valid subscriptions; and the sums there appearing, disregarding those of the $40,000, and $50,000, amount to about the sum of $212,500. What is the effect of such a condition in a subscription? Undoubtedly that it must be complied with before the liability attaches. Such is the agreement of the parties, and such are their legal obligations.

The rule, as I understand it, is well stated by Chancellor Walworth, in *Stewart* v. *Trustees of Hamilton College*, (2 *Denio*, 403.) That was an action brought by the trustees of Hamilton College against Stewart, to recover from him a subscription to the funds of that institution. The subscription contained a provision that the subscribers were not to be holden "to pay the sum subscribed by us, unless the aggregate of our subscriptions shall, by the 1st of July, 1834, amount to $50,000. It was proven on the trial that the nominal amount of the sub-

scriptions equaled that sum on that day, but that $700 was subscribed by unincorporated benevolent associations; that other subscriptions to the amount of $2000 were made by married women; and that other subscriptions amounting to between one and two thousand dollars were payable in land and other property. The chancellor, after pointing out the particulars, in which the terms of the subscription had not been complied with, says, that the conditions upon which the plaintiff Stewart had subscribed, not having been complied with, he never became liable upon his subscription. I shall have occasion, in another connection, to refer to this opinion more fully.

As establishing the same principle, I refer to the case of *Sandford* v. *Handy*, (25 *Wend.* 475.) In that case proposals were issued to form a joint stock company for the sale of certain lands. The lands were to be divided into 23 shares of $5000 each, and the defendant subscribed for one share. All the shares were not subscribed for. The supreme court were of the opinion that by the true construction of the contract all the shares were to be subscribed for before any subscriber should become liable upon his subscription, and that this was a condition precedent—and the whole number of shares not having been taken, the defendant was not liable. It will be observed that in this case there was no express provision in the subscription paper, that the whole number of shares should be taken; but the court holding that by the true intent and import of the agreement, all the shares were to be taken, such taking was a condition precedent to the defendant's liability.

The plaintiff's counsel has referred to another case upon this same contract, in 2 *Denio*, 235, and confidently relies upon it as an authority to sustain the defendants' liability in this case. The supreme court had held in conformity with their decision in 25 *Wend.* (*supra*,) that the subscription of the whole number of shares, *as clearly implied on the face of the agreement*, constituted a very material part of it, and deeply affected the separate interest of each subscriber, and that the defendant could not be made liable, as this material condition of the contract had not been complied with. The court of errors reversed

the judgment of the supreme court, upon the ground that it was not a condition of the agreement that the whole twenty-three shares should have been subscribed. The opinions for reversal were delivered by the chancellor and Senator Lott. The former says, at page 251: "I confess, upon examining the agreement I cannot discover any thing from which it can be reasonably inferred that the subscription of the whole number of shares, or of twenty-one shares, was intended to be made a condition precedent to the rights of the defendant to claim the benefit of the contract, or the rights of the plaintiff to demand a performance on the part of the defendant." Senator Lott says, at page 256: "It was contended, however, that his [the defendant's] *covenant* was conditional, that his agreement was to take one share, if the twenty-three shares were subscribed and not otherwise, and that the subscription of the whole number of shares was an indispensable condition, and an integral term of the contract itself clearly appearing on its face. It is not pretended that there is an express condition of that nature, and a careful examination of the different provisions of this agreement will show that such is not its fair construction." Senators Porter and Bokee delivered opinions in favor of affirming the decision of the supreme court, on the ground taken by that court, that it was fairly inferrible from the whole contract that it was upon the condition that the whole twenty-three shares were to be subscribed. The judgment of the supreme court was reversed by one majority, and it must be assumed on the ground stated by the two judges who delivered the prevailing opinion, that the covenant was not conditional. Instead of this case being, as was assumed by the plaintiff's counsel on the argument, an authority for the proposition that when an agreement is made upon condition, the party can be bound by it, without showing that the condition precedent has been fulfilled, I regard it as sustaining exactly the contrary doctrine. All the judges who delivered opinions in that case concede that if the covenant had contained an express condition that the twenty-three shares should be subscribed, the defendant could not have been made liable without showing that such subscription had been made, and the only difference be-

tween the court of errors and the supreme court was whether such a covenant could be implied as clearly appearing on its face. The supreme court and the minority of the court of errors holding that such was its fair construction, and the majority of the court of errors, though holding otherwise, conceding that if such was its fair construction the plaintiff could not recover.

This case is disembarrassed from the difficulty arising in that. In the agreement under consideration, is an express stipulation that the same "is not to be binding until the sum of $300,000 is subscribed." If I am correct in the view I have taken of the facts in this case, $300,000 was never subscribed to that subscription, but only about $212,500. It never, therefore, became the defendant's subscription. The condition precedent on which he agreed to become a subscriber, did not arise, and therefore no legal liability attached to him in consequence of that conditional engagement.

But it is contended on the part of the plaintiff, that taking all the three subscriptions together, the same amounts to the sum of $300,000, and therefore the condition has been performed and the defendant's engagement is complete. I have already stated the difficulties in maintaining this position. The first and obvious one is, that such is not the defendant's agreement; when he signed this he saw preceding it two distinct, separate and independent subscriptions, one of the 12th of October, 1855, for $40,000, and the other an engagement by sixteen persons that they would subscribe the sum of $50,000, *provided*, the sum of $300,000 was subscribed under the resolution of November 8, 1855. It is apparent to my mind, that originally these three subscriptions were regarded as separate and independent.

It is sufficient for this case to say that there is nothing in the agreement signed by the defendants to warrant the ground now assumed, that the $40,000, and the $50,000, subscriptions, were to be deemed part of the $300,000 which was to be subscribed before such subscriptions were to be binding. I do not think such was originally the intent of the parties. It will be seen that the terms of both these subscriptions were entirely

different from those of the $300,000 subscription. The $40,000 of October 12th, was to be made in notes at 4 months. The $50,000, in cash or notes, at 30, 60, 90 days or at 4 months, while that of the $300,000 was made in notes at 6 and 12 months, in equal amounts. It is impossible therefore to say that these three subscriptions are to be deemed and taken as one, and as forming a part of the $300,000. Their very language and terms contradict this assumption. Besides, it is apparent to my mind, that the fair construction of this subscription for $300,000 is, that the same is not be operative unless the entire sum of $300,000 should be subscribed thereto, on the same terms as therein expressed, viz: in premium notes at 6 and 12 months in equal amounts. Now, there is no ground for asserting that any such sum has been subscribed on those terms, and the difficulties are to me insurmountable, in taking other subscriptions, made at different times and on different terms, and regarding them as a part of this. This view of this case is so clear and conclusive to my mind, that I should have no hesitation in ordering judgment for the defendants without considering the other questions raised. But, as they have been discussed with care and ability, and pressed with earnestness upon the court, they merit a careful consideration.

The plaintiff contends that as the whole sum of $300,000 was actually subscribed after the date of the 12th of October, this court is to hold, that within the fair meaning and intent of the subscription, signed by the defendants, the sum of $300,000 was subscribed, and therefore the condition was fulfilled. This is on the assumption that the subscription of $40,000 and that of $50,000 (in fulfillment of which $48,000 appears to have been only subscribed) are included as part of the $300,000 subscription. The objections to this have already been stated. It is not alleged that all the subscriptions made after October 12, including that, exceed the sum of $300,000. It is said that the sum total of the whole just equals that sum. In this total is included the $40,000 subscription of October 12. That subscription, as is apparent from the terms of the resolution of October 30, had been placed on a footing different

from the other subscription made under the resolution of the board of November 8, 1855. It, in fact, was to be regarded as confidential, while the residue of the subscription did not partake of that character. It was securing to a portion of the subscribers an advantage not participated in by the others, and I do not regard the fact that the trustees did not carry out this arrangement as varying its legal effect. A not dissimilar arrangement existed as to a portion of the subscriptions for the benefit of Hamilton College, in the case of *Stewart* v. *Trustees of Hamilton College*, (*cited supra.*) There the total of the subscription was to be $50,000. The whole amount not being subscribed by the day named, the trustees passed a resolution to raise further money to save harmless those persons who had agreed, and who thereupon did make up the deficiency, and the trustees therefore regarded the whole amount as subscribed. Chancellor Walworth said, in reference to such an agreement that, "the essence of every agreement of this kind is, that there should be perfect equality among the subscribers as to the nature and extent of their respective liabilities for the several sums subscribed by them respectively. To have made this general subscription valid, so as to fill up the sum of subscriptions and contributions to the amount of $50.000, (the sum in that case to be subscribed before the subscriptions became binding) within the terms of the agreement, it should have been an absolute donation of the amount of the deficiency, to be paid at the same time as the other subscriptions, and no part of it to be restored or refunded to them upon any contingency, or in any event other than such as were common to the subscription of all the other subscribers." In support of this well settled principle, alike in harmony with the law and sound morals, the Chancellor refers to the case of a composition deed, where there is an express agreement between the creditors themselves to discharge the debtor upon receiving a ratable proportion of the respective debts, any private agreement or understanding between the debtor and any particular creditor that the latter shall at any time, or in any contingency receive a greater sum than the amount of his debts specified in the composition deed,

is held to be void, as a fraud upon the other creditors. (1 *Anst. Rep.* 202. 3 *id.* 910. *Jackson* v. *Duchaire*, 3 *T. R.* 551. *Cockshot* v. *Bennett*, 2 *id.* 763. *Steineman* v. *Magnus*, 11 *East*, 390. *Weed* v. *Bentley*, 6 *Hill*, 56.) The agreement, therefore, to regard this $40,000 subscription upon a different footing, than the residue of the subscription was a fraud upon the other subscribers, and vitiated the whole transaction.

But it is argued that the defendants must have known that this $40,000 subscription was to be taken as part of the $300,000 subscription, and the terms and conditions upon which it had been made. *First.* Because the trustees, in their resolution of November 8, 1855, authorizing this subscription, stated that it should be binding when $300,000 was subscribed, including the $40,000 already subscribed. *Second.* That the reference to that resolution, in the subscription signed by the defendants, adopts it as part of the terms of the subscription. In relation to the first position, nothing was said in the resolution of November 8, of the terms upon which the $40,000 had been subscribed, and although the trustees might have intended that the subscription should be binding on all the subscribers, when $260,000 additional was subscribed, such clearly is not the language or true construction of the subscription. That is the agreement of the defendants, and by that must they be bound; any intention of the trustees not communicated to them, and assented to by them, can have no significance in determining their liability; and it seems to me that the reference the subscription to the resolution of the trustees was not of such a character as to lead the defendants and the other subscribers to suppose that it contained any thing else than the general authority to raise a subscription to the amount of $400,000. It certainly cannot be fairly said that this reference adopts the provisions of that resolution, that the subscription was to be binding when $260,000 was subscribed, when the subscription itself contains a contrary stipulation. The latter must govern as being the contract of the defendants.

Conceding that the defendants had agreed to be bound, pro-

vided $260,000 in addition had been subscribed, was that condition complied with? Including the $48,000 subscribed, as I regard it in fulfillment of the engagement of November 8, to subscribe $50,000 the total of all, excluding the $40,000, is just equal to the requisite sum of $260,000. To make up this sum there is included subscriptions to the amount of $37,000 by various insurance companies. I am at a loss where to find the power or authority conferred upon these companies to advance their notes in anticipation of premiums on insurance which they may never make, and in this case never did make except to a small extent, to sustain a failing or revive an insolvent corporation. If these subscriptions, or any part of them, were ultra *vires*, they are void and no subscriptions, and it follows that the necessary amount to make the defendants' subscription binding, never was raised. No power is shown in their charters thus to apply the funds of this corporation to such purposes, and it is certainly not an incidental power and necessary to the conduct and management of the business for which they were called into being. It certainly needs no argument or authority to show that a corporation created for the purpose of insurance has no power to advance its moneys, or obligations, to sustain another corporation in similar or dissimilar business. Neither does the authority given to these companies to reinsure policies or risks taken by them in other companies, authorize or give any warrant for these subscriptions. When these premium notes are given, the maker becomes to that extent a stockholder in the company receiving the premium notes, and by numerous decisions in this state, the whole amount of the note is payable, though no insurance has ever been effected by the maker, and such notes are a substitute for capital stock. (1 *Sand. S. C. R.* 158, *and cases there cited.*)

Could these companies thus subscribe to the capital stock of the Atlas Insurance Company? This point was ruled in the negative by the supreme court of Connecticut. (*Mutual Savings Bank* v. *Meriden Agency Company*, 24 *Conn. Rep.* 159.) The chief justice in delivering the opinion of the court in that case says: "But when the directors of the company subscribed

for stock in a building association, whatever may have been their motive, whether to obtain a loan of money, or for purposes of speculation, they transcended the powers conferred upon them, and departed from the legitimate business of the company, as much so as if they had subscribed for stock in a manufacturing or steam boat company. Such subscription, in our opinion, is not binding upon the defendants, and any payments made upon it to the plaintiffs would be money received by them without consideration." The court held in that case that the subscription was void and that the corporation never became stockholders. If these corporations had the power to make their subscriptions, we have seen that the legal effect of such subscriptions was to make the subscriber a stockholder to the amount thereof, and liable to pay such subscription or premium note forthwith, though the corporation receiving it might have failed the next day and never earned in premiums one cent of the amount. Can it be contended that insurance companies organized for a specific purpose, can thus put at hazard, nay waste entirely, the capital stock or fund contributed and held by them, for the purposes of their charter? I think, clearly not, and that subscriptions by them like these now under consideration, are ultra *vires* and void. Such I understand is the current of authority not only in this country, but in England. The case of *Tallmage* v. *Pell*, (3 *Seld.* 328,) contains the rule of this state governing corporations, and that case meets the argument of the plaintiff's counsel, that because these companies were authorized to reinsure their policies or invest their surplus funds in the stocks of other incorporations, therefore they had authority to make this subscription. Neither of these objects were those for which these subscriptions were made, and though they had authority to do these things, it does not follow that they had authority to lend their means or credit to sustain a failing or insolvent corporation or become stockholders in other corporations.

I shall content myself with citing a single case from the English reports for the rule on this subject as established there. The case of the *East Anglian Railway Company* v. *Eastern*

Counties Railway Company, (7 *Law and Eq. Rep.* 505,) is a leading one on this subject, and I am not aware that its authority has ever been questioned or overruled. The case appears to have been very fully and ably argued by the counsel, and maturely considered by the court, and the points decided are; that a railway company incorporated by act of parliament is bound to apply all the funds of the company for the purposes directed and provided for by the act, and for no other purpose whatsoever. And when such a railway company was incorporated by a public act of parliament "for the purpose of making and maintaining" a particular railway and other works by the act authorized, "and for other purposes therein declared," and they were empowered by the act to raise money for making and maintaining the railway and other works authorized by the act, and the money so raised was directed to be expended towards those purposes and otherwise carrying the act into execution, and after paying these expenses the profits of the company were to be divided among the proprietors, the purposes mentioned in the act were confined to the acts to be done upon and relating to the railway to be made by the company. The defendants, the company so incorporated, covenanted with the plaintiffs, another railway company, to take a lease of their railways and to pay the costs of soliciting bills then pending in parliament, by which the plaintiffs were to be authorized to make extensions and branches of their railways. In an action for breach of covenant in not paying the costs of the bills in parliament, held, that the act incorporating the defendants being a public act, must be presumed to be known to the plaintiffs, and that they could not recover, inasmuch as the covenant entered into by the defendants was beyond the scope of their authority as a corporation, and was therefore illegal and void, however beneficial to the defendants' railway, the objects of the covenant, if carried out, might be. Lewis, Ch. J., says: "It is clear that the defendants have a limited authority only, and are a corporation only for the purpose of making and maintaining the railway sanctioned by the act, and that their funds can only be applied for the purpose directed and provided for by the statute. * * * Any proprietor when he takes shares has

a right to expect that the conditions upon which the act was obtained will be performed, and it is no sufficient answer to a stockholder expecting his dividend, that the money has been expended upon an undertaking which at some remote period may be highly beneficial to the line. The public has an interest in the proper administration of the powers conferred by the act."

Applying these principles to the present case, it is quite clear that no power was given to the officers of these various companies to make this subscription, and thus if they had the power, subject the property of their stockholders to the hazards of a business carried on by another corporation, in whose management they had no voice or control, or to appropriate the funds and property of their shareholders to the payment of losses sustained by another corporation, or to the discharge of debts incurred by it. No such departure from the powers conferred on these companies, or from the duties imposed upon them, can be sanctioned by this court. Such acts are unauthorized and void, and although these companies did subscribe to this fund the sum of $37,000, it was in fact no subscription, and the necessary amount to make it binding by its terms on the defendants, supposing all the residue properly made up, remained deficient to this amount.

But it was contended on the argument, that supposing this objection tenable, it appeared by the testimony that the Atlas Insurance Company had realized the proceeds of all their subscriptions of those companies, except that of the International and Philadelphia Insurance Company, amounting to $7000, and $2500 of that of the Astor Mutual Insurance Company. It appears that the notes received from these companies, thus realized, were passed away by the Atlas Mutual Insurance Company, and if the doctrine of the supreme court of Connecticut is sound, any payment made by these companies, being upon a void subscription and without consideration, may be recovered back. It is, therefore, far from safe to say, that the Atlas Insurance Company has received the avails of these subscriptions. It is quite beyond contradiction, that of these subscriptions, $9500 are still unpaid by these companies, and if the law is as an-

nounced in this opinion that sum cannot be collected. These companies had no authority to make any such contract; it is simply void, and is no subscription within the meaning and intent of the stipulation that $300,000 was to be subscribed before the subscription was to be binding.

But assuming that I am in error, in reference to the binding force and validity of the subscription of these companies, there is an objection to that of one of them, which is fatal to it, and sufficient to reduce the subscription below the $300,000. I allude to that of the International Insurance Company. That was never authorized by the directors of that company or known to them. It was proven on the trial of this case that it was made under an agreement between the two companies for a mutual exchange of notes for the sum of $5000. That these companies had no authority to make such exchange, needs no argument to fortify and illustrate. That such an arrangement was a fraud upon the other subscribers, we have seen to be established, and consequently it vitiated the whole transaction. In the language of Chancellor Walworth, already cited, the essence of such an agreement is that there should be perfect equality among all the subscribers as to the nature and extent of their respective liabilities. No such equality is preserved by such an arrangement, but is equally, if not more, vicious and objectionable, than the arrangement in reference to making the $40,000 subscription confidential. It was proven that several of the individual subscriptions were made upon terms and arrangements, not common to other subscribers, being taken, on account of debts past due by the company to the persons making the subscription, the condition being if he would subscribe, it should apply in part payment of the debt due and the balance would be paid by the company. This arrangement was equally a fraud upon the other subscribers, and vitiated the transaction.

I am, therefore, constrained to hold, in every aspect in which I have regarded this case, that the condition precedent, which the parties agreed to and reduced to writing, and which was made part of the agreement upon which these defendants are now sued, viz: That the same was "not to be binding until the

sum of $300,000 is subscribed," has not been fulfilled, and that consequently no legal liability has been created against the defendants by signing the same.

Judgment for the defendants.

[New York Special Term, April 24, 1857. *Davies*, Justice.]

John Hecker and G. V. Hecker *vs.* The New York Balance Dock Company.

Roberts *vs.* The Same.

The corporation of the city of New York, by its charter and the powers conferred upon it by the legislature, has the right to regulate the uses of the basins and slips in the city; and its regulations are binding upon all, provided they do not interfere with the rights of the owners to receive and collect their wharfage.

Subject to this right, the corporation may direct the use of any particular slip or wharf to be appropriated exclusively for any particular craft or class of vessels; and in reference to its own wharves and piers, may grant the exclusive use to any person, for any particular craft or class of vessels, and may do the same, with the consent of those entitled to wharfage, in reference to any basin, slip or pier.

The general authority of the state and city governments, in reference to the locating of ships and vessels, and the uses of the wharves, piers and slips, is exercised through the dock masters, as to the public or corporation basins, piers and wharves, and through the harbor master, as to private basins, piers and wharves.

The jurisdiction of those public officers is co-extensive with every legal and legitimate use of the basins, piers and wharves.

The occupation of basins and slips by a balance dock, for the repairing of vessels, is an occupation for a lawful and legitimate commercial purpose; and if sanctioned by the proper officers, and assented to by the owners of the piers and bulkheads, and under lease from those who are entitled to collect and receive the wharfage and cranage from the premises occupied, no other person has a right to complain of such occupation, or to restrain the same by injunction.

MOTION to dissolve injunctions. The opinion sets forth the material facts.

D. D. Field, for the plaintiffs.

S. J. Tilden, for the defendants.

DAVIES, J. This is a motion on the part of the defendants in each of the above entitled causes for a dissolution of the injunction order heretofore granted therein. The motions have been argued after most ample preparation by the counsel, and with eminent ability. The grave and important considerations connected with the subject, and the influence the decision to be given must necessarily have upon the rights of the parties, demanded this careful consideration, and the labors of the court have been greatly aided by this enlarged discussion.

The plaintiffs complain that the use by the defendants of their floating dock for the reparation of ships and vessels, of the slips on the East river, between piers 40 and 41, and 41 and 42, is an interruption to their business, and allege that the use of those slips for boats, or craft, to supply the mills of the one, and the store of the other, is convenient, and the occupation thereof by the defendants for the purpose aforesaid, subjects them to expense and inconvenience. The plaintiffs in the first suit own no property fronting or adjoining the East river; the plaintiff in the second owns a store fronting on South street, and near the premises occupied by the defendants, but not opposite thereto. The plaintiffs are not the owners of the piers or bulkheads, nor have they any interest therein, nor are they entitled to collect any wharfage thereon. They are not interrupted in the enjoyment of any property belonging to them, but they complain that the occupation of the defendants prevents their using the property of others, in such manner as they deem most fit, convenient and appropriate. The defendants' use and occupation is with the consent of the true owners of the piers and bulkheads, and under lease from those who are entitled to collect and receive the wharfage and cranage from the premises thus occupied. Can the plaintiffs object to such occupancy, on the ground that it would be more convenient to them, and more advantageous to their business, that these slips should be reserved for the use of such craft or vessels as they may have occasion to use and employ?

By section 7 of the Dongan charter, confirmed by the Montgomerie charter, power is given to the common council of the

city of New York to make such laws, orders, ordinances and constitutions as to them shall seem necessary and convenient for the good rule, oversight, correction and government of the said city and liberties of the service, and of all the officers thereof, and for the several tradesmen, victuallers, artificers, and all other the people and inhabitants of the said city. Power is also given, to enforce obedience to such by-laws, ordinances, &c. by fines and amercements against all persons offending against the same. By section 2 of the Montgomerie charter, the jurisdiction of the city of New York extends to and embraces the East river and Sound, to low water mark on the Long Island shore. The proprietors of land on the East river were bounded in their original grant by high water mark; and by section 3 of the Dongan charter, there was granted to the corporation of New York all the land around the island to low water mark. This grant was confirmed by the Montgomerie charter; and by section 38 of the last mentioned charter, there was, in addition, granted to the corporation the soil under water extending 400 feet beyond low water mark into the East river. These grants have been held by the highest court in this state as vesting the absolute ownership of the soil under water from high water mark, to 400 feet beyond low water mark, in the corporation, with full power to sell the same, and to make and erect streets thereon, without the consent of the owner of the adjoining land at high water mark, and thereby entirely excluding and cutting him off from access to the water. (*Furman's case*, 5 *Sand.* 16, *affirmed in the court of appeals. Gould* v. *Hudson River Rail Road Company*, 2 *Selden*, 522.)

The corporation had authority given them by this section of the charter, in reference to the land thus granted, to fill, make up, wharf and lay out every part thereof; and the only limitation upon their use of the same in any manner they might think fit was, that they should not wharf out before any persons who might have prior grants, of quays or wharves beyond low water mark, without the actual agreement or consent of such persons, owners of such quays and wharves. Section 7, of the act of April 3d, 1798. (*Davies' Laws, p.* 399,) provides that

no building of any kind or description whatever, other than piers and bridges, shall at any time thereafter be erected upon said streets or wharves, or between them, respectively, and the rivers to which they respectively front and adjoin. By the last mentioned act, the corporation were authorized to adopt a permanent plan for the improvement of the city on each river, by laying out an exterior street thereon, and the same was to be constructed by and at the expense of the proprietors of the land adjoining or nearest and opposite to said streets or wharf in proportion to the breadth of their several lots. If said proprietors should neglect or refuse to build said streets, and fill up the intermediate spaces, then the same might be done by the corporation at their expense, and the amount so expended might be recovered of said proprietors. By section 5 of said act, it was made lawful for the corporation to direct piers to be sunk and completed at such places and in such manner as they might think proper, in front of said streets and wharves, and to be connected with the same by bridges, at the expense of the propietors of lots lying opposite to the places where such piers shall be directed to be sunk, and it was further provided that if such proprietors should refuse or neglect to sink or make said piers, then it might be lawful for the corporation to do so at its own expense, and receive to their own use wharfage for all vessels that might at any time be at, or be fastened to, said piers and bridges. By the 3d section of the act of April 2, 1806, (*Davies' Laws, p.* 425,) it is provided that in case any person who, according to the provisions of the act before referred to, shall have neglected to sink or complete piers or bridges, in conformity with the directions of the corporation, it may be lawful for the corporation to grant the right of making such piers and bridges, and the right of receiving the profits thereof, to any person or persons, in fee or otherwise.

The defendants in this case are the lessees of the owners of the several piers, bridges and bulkheads occupied by them, and their occupation is by and with the consent of such owners and persons entitled to the wharfage and cranage. These charges are regulated by the act of 31st March, 1801. (*Davies' Law*

p. 400.) Assuming that the occupation of the defendants is not a public nuisance, it must be regarded, I think, as quite clear that the corporation, by its charter and the powers conferred upon it by the legislature of the state, have the right to regulate the uses of the basins and slips in the city, and that their regulations are binding upon all, provided they do not interfere with the rights of the owners to receive and collect their wharfage. Subject to this right, it appears to me quite clear, that the corporation may direct the use of any particular slip or wharf to be appropiated exclusively for any particular craft or class of vessels; and in reference to their own wharves and piers, may grant the exclusive use to any person, for any particular craft or class of vessels, and may do the same, with the consent of those entitled to the wharfage, in reference to any basin, slip or pier.

The state legislature have conferred upon the corporation the general authority to enact ordinances regulating the manner of the public uses of the basins, piers and wharves of the city for all lawful and legitimate commercial purposes. (All the city charters; *Kent's Notes, pp.* 134 *and* 176, where the various statutes are said to be merely auxiliary to the charters; 2 *R. L. p.* 463, § 236; *Davies' Laws, p.* 559; *Act of April* 16, 1830, *L. ch.* 222; *Davies' Laws, p.* 705.)

The statute of 1813 applies as well to private as corporation or public slips. (*Vandewater* v. *City of New York*, 2 *Sand.* 259.) Under this general power, the common council has always had and exercised the power to pass ordinances regulating the uses of the basins, piers and wharves, and classifying the various kinds of business and distributing these classes to particular basins, piers and wharves. (*Vandewater* v. *City of New York*, *sup.*) But the act of April 16, 1830, must remove all doubts as to the authority of the corporation to assign exclusively piers and slips and basins to any particular class of business, or exclusively to any particular person. This act has been construed to add the authority to create exclusive privileges in favor of particular individuals, of the same class, as for instance, lines of steamers and packets, or ships of a par-

ticular house; such authority being absolute as to the corporation or public wharves, piers and slips; and as to private wharves, piers and slips, conditional on the assent of the owners or those entitled to the wharfage. This has been for years the constant usage of the corporation, and seems essential to the commercial wants of this port. It is recognized and sanctioned by the case in 2 *Sand.* 259. This general authority of the state and city government in reference to the locating of ships and vessels, and the uses of the wharves, piers and slips, is exercised through the dock masters as to the public or corporation basins, piers and wharves, and through the harbor master as to private basins, piers and wharves. That authority has not been limited or precisely defined by statute, but is comprehensive and must be construed as extending to all forms of police regulation.

In reference to the power of the harbor masters, the act of March 16, 1850, (*Davies' Laws, p.* 994, § 3,) substantially reenacts a series of statutes, commencing as early as that of April 1, 1796, (3 *Greenl.* 317,) and is in the exact language of the revision of 1813. It is declaratory as to the duties and authority of the harbor master, and recognizes the power of that officer. They are to "station and regulate all ships and vessels," whether lading or unlading, or whether waiting for freight or laying up for the winter, &c., and, in general terms, to station and regulate all ships and vessels in the stream of the East or North river, within the limits of the city of New York, and the wharves thereof; this jurisdiction being co-extensive with every possible commercial use of any ship or vessel; to remove, from time to time, any ship or vessel not employed in receiving or discharging cargo, to make room for and to accommodate others requiring room to receive and discharge their cargo; and such directions are to be enforced, under a penalty of $50. In practice, the power of removal, which is expressed in more restricted terms than the other, has been held to apply to all ships and vessels, under all circumstances. (*Adams* v. *Farmer*, 1 *E. D. Smith*, 588.) This statute gives the harbor master, by virtue of the words "ship, or vessel," jurisdiction of every

"structure intended to float upon the water," in the private basins or at the private piers and wharves. (*Adams* v. *Farmer*, *Id.* 588.) The same rule and the same authority apply to and are devolved upon the dock masters of the corporation, in reference to the public or corporation slips, piers or wharves. There cannot, I think, be any doubt that the jurisdiction of these public officers (whether harbor masters or dock masters) is co-extensive with every legal and legitimate use of the basins, piers and wharves. It is manifest that this view is correct, from the authority of the case of *Decker* v. *Jaques*, (1 *E. D. Smith*, 80.) There it was said that the same words, "ship and vessel," in the statute giving wharfage, have been held to include even an oyster boat made square and boarded up at each end, and employed as a mere receiving vessel, not being used or capable of being used, in navigation, or indeed of being employed in any use, properly or legitimately commercial, as connected with or necessary to navigation.

These views will be strengthened by reference to the practice of the harbor masters and the dock masters, and the rules and regulations applicable to them. The harbor masters have adopted and published a minute code of regulations as applicable to vessels, their places of mooring, lights, position, rigging, their points of accommodation in certain cases, and many other subjects. (*Haskett's Abstract of the Laws of Vessels, Wharves, &c. p.* 28.) The ordinance of the common council, providing for the appointment of the dock master, declares the purpose to be "the direction of the removal and disposition of vessels," "and the removal and disposition of vessels," and the authority conferred upon him is "to give such advice and direction from time to time, as" he "shall think just and proper," "touching the *laying*, fastening and *berth* of any such sloop, boat, or other vessel whatever." The word "disposition" clearly implies arrangement or classification, and it clearly imports authority to give those orders and directions upon a plan or system. (*Corp. Ord.* 1845, *ch.* 34, *title* 2, § 1, *p.* 333, *and* § 12, *p.* 336.) The dock master has also the authority to allow vessels out of employ, to lay up in any corpo-

ration or public slip. It is thus seen that these officers have by immemorial usage, exercised the authority for promoting public convenience and increasing the accommodations for ships and vessels, and calssifying them in their use of the ba sins, piers and wharves, by habitually sending large ships to basins having deep water, and small vessels to slips having shal low water; distributing them also, according to the locations for business, and generally so arranging the use of the basins and slips as, in their judgment, would best promote the general convenience. There cannot, I think, be any doubt that the acts of these officers, though they may sometimes amount to a continuous occupation of the particular basin for a particular use—in fact, to a practical appropriation of it for the time being to a particular class of vessels—are clearly within the legal competency of these officers, and are not only not illegal, but unobjectionable and promotive of the commercial advantage and prosperity.

It is then, I think, clearly and satisfactorily apparent that the occupation of the defendants, if legal, for the purpose designed by them, is, in all other respets, in accordance with the charter of the city, the laws of the state, and the ordinances of the common council, and is with the express sanction of the proper officer, charged with the duties of seeing that they are all properly executed. So far as they can give consent or authority to the defendants for such occupation, they have it in the most ample manner.

But it is objected, on the part of the plaintiffs, that such use of the basins, piers and slips is not for a lawful and legitimate commercial purpose, and that no consent or authority can be given for their occupancy for any other purpose. Conceding this to be so, the inquiry remains: Is the use to which the defendants have devoted these slips, piers and basins, lawful and legitimate? It seems to me that the loading and discharging vessels of their cargoes is not the only legitimate commercial use of a pier, slip or basin, but one of many uses; among others, that of waiting for freight, the laying up of a ship or steamer, while not employed in winter, or at any other time, the repairing or coppering of a vessel, or the putting in of masts, boilers or machinery

of a steam boat. All of which uses are subject to the police regulations, and the direction of the proper officers heretofore adverted to. The special commercial use, which consists in the repair or coppering of a vessel, is quite as essential and important to navigation and commerce as any other; and it was well said on the argument, that it "is a use which precedes every other, and is a condition without which no other could exist." It is undeniable that the basins, piers and wharves in this city have from time immemorial been employed in this use at all times. Such use is not derived from any statute though recognized by it, as it necessarily originated before any legislation on the subject. Vessels could not go on to the land for reparation, and, *ex necessitate*, that work to them must be done on the water.

This legal and legitimate commercial use of the basins, piers and wharves, for the repair, caulking or coppering of vessels has been frequent, and now is in express terms recognized by the statutes of this state, as well as by the ordinances of the common council. The act of the legislature which fixes the rate of wharfage, passed March 31st, 1801, by section 2 provides: That whenever any ship or vessel shall be brought to any *dock* or *wharf* to repair or careen, and it shall be found necessary to sling or erect any stage or stages on the sides of the said vessel, for the more convenient caulking or repairing the same, or where any boats, scows or floating stages are brought alongside said vessel for the purpose of caulking, repairing or careening as aforesaid, it shall and may be lawful for the owner or owners of said wharf to take and receive thirty-three and one-third per cent in addition to the sum the said vessel is liable and compelled to pay for the wharfage aforesaid. (*See* § 213, *R. L.* 1813, *Davies' Laws*, *p.* 552.) A subsequent section of the same act fixes the rate of cranage for taking out and putting in masts of vessels lying at the wharves. These provisions are now, and for the last fifty years have been, in force and in constant and daily application. (*See Laws of* 1801, *ch* 115, 2 *Web.* 123, *Davies' Laws*, *p.* 400.)

It is thus seen, that the use of the basins, slips and piers for the repairing of vessels has been constant and unvarying, and

expressly sanctioned by legislative enactment. No higher approval could be given. Is the mode of reparation now practiced by the defendants of such character as to abrogate this long continued practice and sanction? At an early period, when vessels were small and easily handled, the form in which this use was enjoyed was by careening the vessel afloat in the basin. thus necessarily occupying a larger portion of the basin than when the vessel was erect, and also a very large portion of the adjoining pier, or by slinging stages on its sides, or drawing alongside boats, scows or floating stages, or heaving out the vessel upon the shore between the piers. Then by drawing the vessel out of the water upon ways. Still later it was by lifting the vessel in a cradle, strung on chains, or by the hydraulic or screw dock. And now in the new form used by these defendants, made necessary by the increased size of the vessels, by which the ship, after being floated or towed into a submerged wooden vessel, was then raised by pumping the water out of its tanks in its bottom. It is now 16 years since this form of repairing vessels has been used, and one of the defendants' docks has for the last ten years occupied the basin between piers No. 41 and 42, nearly opposite the plaintiff Robert's store; and so far as it appears, without complaint from him. That dock has now been removed into the basin between piers No. 40 and 41, and of which the plaintiffs in the first above entitled suit complain; and the plaintiff in the second suit complains of the defendants' placing another dock in the basin vacated by the dock removed to the adjoining basin. I cannot fail to see that this new form and mode of using the basins or slips for the reparation of vessels greatly lessens the time necessarily occupied for such purpose, and greatly diminishes the space also necessary. Neither can I see that it is any legal objection that the corporation, by its proper officer, in the exercise of its conceded powers, has deemed it proper to assign certain localities where this reparation is to take place. I cannot fail, also, to see that this new and improved form of doing this work, leaves larger portions and a greater number of slips for the loading and discharging of cargoes, than could have

been so occupied under the former system. This latter mode of using the basins, piers or wharves, for the repair or coppering, or caulking of vessels, is but a new and improved form of an old and well established use. For the nature of the use is not changed, but only its form. The new form occupies less space in the basin, or at the pier or wharf; first, because a ship taken up perpendicularly requires less space than one careened, with its masts and spars, and less than one repaired by means of floating stages, boats or scows; and in this connection the fact is significant, that after the new mode had come into use, regulations were made by the common council, restraining the old mode of repairing by careening, &c., in the public slips, thus giving the preference to the new mode. The statutes of the state, however, remained unchanged Secondly, the present mode, as before observed, greatly shortens the time of repairing, and a slip used for this purpose would, by this mode, accommodate a much larger number of vessels than it would by the old process. But I must regard the new form or process of reparation as indispensable to the use itself in the present size of vessels, and the increased wants of our expanding commerce. These changes have outgrown the possibility of hauling them in the old mode on to the shore, or by careening or repairing them by floats or scows. They cannot be handled as smaller and differently constructed vessels could, and this state of things has created an absolute necessity for the new and improved mode. The old mode of using the basins, &c. was sanctioned by long continued use, by legislative enactment, by the state, as well as regulation by the city government, and by judicial approval. How can the new, which produces less interruption to commerce, which occupies less space and less time in doing the same thing in another way, and objectionable only on the ground that it occupies the same space which vessels must themselves have occupied for the same object, be deemed a nuisance, and an illegal obstruction to the navigable waters of the state? I confess myself unable to follow the train of reasoning which arrives at such a result. The law expands and adapts itself to embrace, provide for, and protect every new

form of an old use which may, from time to time, be invented to facilitate the use of any thing subservient to the wants and comforts of man, by improving its form, or to meet a new exigency in that use. (*Per Jones, J., Drake* v. *The Hudson River Rail Road Co.*, 7 *Barb.* 546-8.)

I have no doubt that it is my duty to discharge the temporary injunction in both cases.

Ordered accordingly.

[New York Special Term, April 24, 1857. *Davies*, Justice.]

Ramson *vs.* The Mayor &c. of the City of New York.

By the charter of the city of New York the counsel for the corporation is to have charge of, and conduct, not only all the law business of the corporation, but all the law business of the several departments of the corporation, and all other law business in which the city shall be interested.

For the performance of the duties of his office, a compensation is provided, and he is bound to attend, personally, to all the law business of the corporation and of its several departments; and there is no power in the common council, or any of its committees, to withdraw business of that nature from his hands and confide it to other persons.

Accordingly, where the board of aldermen appointed a committee to conduct an investigation into the affairs of the police department, and during its progress several witnesses declined answering questions put to them by the committee, and the committee instituted legal proceedings to compel them to answer, and employed counsel to conduct such proceedings, instead of applying to the counsel for the corporation, who was ready and able to do so, to manage the same; *it was held* that the corporation was not liable to pay the counsel thus employed, for their services.

IN 1855, the board of aldermen of the city of New York resolved to institute an investigation into the affairs of the police department, and appointed a committee to conduct the investigation. During its progress, several witnesses declined answering questions put to them by the committee, and the committee instituted legal proceedings to compel them to answer. The counsel for the corporation was not employed, or applied to,

to conduct the proceedings; but the special committee employed such counsel as were agreeable to them for that purpose; among others, the assignor of the plaintiff. There was no inability on the part of the counsel for the corporation to act in the premises; and he testified that he should have acted if he had been applied to for that purpose. The bill of the plaintiff's assignor, for professional services rendered to the committee, amounted to $681; and to recover that sum this suit was brought. The action was tried by the court, without a jury.

A. Nash and *Wm. Curtis Noyes*, for the plaintiff.

M. V. B. Wilcoxson, for the defendants.

DAVIES, J. No question is made in this cause as to the rendition of the services of the plaintiff's assignor, or the reasonableness of the charges therefor. The simple question presented is, can the corporation be made liable for this claim?

Section 18 of the charter of 1849 organizes an executive department, to be known as the "Law department," "which shall have charge of and conduct all the law business of the corporation, and of the departments thereof, and all other law business in which the city shall be interested, when so ordered by the corporation." By the city charter, therefore, the counsel to the corporation is "to have charge of and conduct," not only all the law business of the corporation, but all the law business of the several departments of the corporation. These provisions apply to all cases in which the corporation, or any of its departments, have any law business to be transacted. In addition to this, the counsel is to have charge of and conduct "all other law business in which the city shall be interested, when so ordered by the corporation." The application of this latter provision, and the reasons for its enactment, are familiar to all who have had any practical knowledge of the affairs of the city government. Many suits, proceedings, and causes, are constantly instituted, in which neither the corporation nor any of its departments are parties. But the questions to be decided may be

such as to affect the property or rights of the corporation, or some of its officers. Previous to the charter of 1849 such suits were defended or prosecuted by counsel employed by the immediate parties to the action, and frequent calls were made upon the city treasury for their payment, on the ground that the corporation was interested in the suit or in its result. The intent of the charter of 1849 was to place all legal business, in the control and under the management of the corporation counsel, in the result of which the corporation might have any interest, and for the expense of which it might, by any possibility, be called on for payment. It was in reference to this class of cases, that the counsel to the corporation was to take charge of and conduct, whenever required so to do by the corporation, all law business in which it had any interest. It is quite manifest, that it was the intention of the framers of the charter and the ordinances, that all the law business of the corporation, or of its departments, or in which the corporation should deem it had any interest, should be conducted by, and should be placed in the charge of, the counsel to the corporation. For these services, a specific salary is given to that officer, such as was deemed an adequate and reasonable compensation therefor. These services he is bound to render, and must do it for the compensation allowed. It is in the power of the common council to alter and graduate this compensation, from time to time, in reference to the services rendered: but I can find no authority for it to withdraw, and place in other hands, duties which the charter has confided to him, and which he, by his oath of office, and every obligation resting upon a public officer, is bound to discharge.

The counsel is not only required to take charge of, and conduct all the law business of the corporation, but all the law business of the several departments thereof. The powers of the corporation of this city are divided into legislative and executive. The legislative powers are vested in a board of aldermen and board of councilmen, who, together, form the common council of this city. These two bodies, therefore, form the legislative department of the city government, and are as much subject to the provisions of the charter as the executive department. The

powers of the latter are vested in the mayor, and the heads of the several departments created by that charter, and each moves in its allotted sphere, subject to the restraints of their common constitutional superior, the charter of the city. It is, therefore, quite apparent, that the counsel to the corporation has confided to him, and it is made his duty to conduct, as well all the law business of the legislative department of the corporation, or either branch of it, as to conduct the law business of the several executive departments, and their several bureaus and subdivisions. And it is not easy to see how it is competent for the legislative department, or any of its committees or agents, to pass by the law officer selected by the people, and charged by the charter with these duties, and select and appoint other counsel. If it can be done, it may be equally competent for each of the executive departments, and their several subordinates, to do the same thing.

This certainly would present an anomalous state of affairs. Each department might thus have its own law officer, subjecting the city treasury to enormous drains, while the legally and duly selected law officer of the city, to whom is given a salary for the discharge of these duties, who has an office and clerks provided for at the public expense, to enable him the more readily to discharge them, may be sitting idly in his office, and receiving this compensation, without rendering any equivalent. I am quite sure that no such state of things can be allowed under the charter, and that there can be no serious doubts that it cannot be permitted. If the duties of counsel prescribed by charter can be taken away from him and confided to others by the common council, or either board, or by any committee thereof, why may not the same thing be done as to those of the mayor, comptroller, or any head of any other department? The simple statement of the proposition carries with it its refutation. If it, however, can be done in the one case, it certainly can in the other. Section 19 of the charter of 1849 authorizes the common council to establish such other departments and bureaus as they may deem the public may require, and to assign to them and those therein created, such duties as they may direct, *not*

inconsistent with that act. This provision is a clear legislative restriction on the powers of the common council to withdraw any duties confided by the charter to any particular department or bureau, and devolve the same upon any other department or bureau then existing or thereafter to be created.

So long as these plain and unmistakable provisions of the charter continue in force, I can have no doubt that they must be conformed to.

If there could be any doubt of the power of the common council to take upon themselves duties devolved on the departments, it was removed by the decision of this court in the case of *Christopher* v. *The Mayor &c.* (13 *Barb.* 567.) In that case the board of aldermen assumed to direct the commissioner of repairs and supplies as to the person with whom he should make a contract for the rebuilding of Washington market. This court held, that a contract, not made by the commissioner in pursuance of the charter and ordinances of the city, would be invalid, and granted an injunction restraining the action of the common council. I am, therefore, constrained to say, that the action of the committee, in the present case, was in direct conflict with the charter, and without authority, and consequently void; and that their employment of the plaintiff's assignor, however meritorious the services he may have rendered, or reasonable the charges made, created no legal liability upon the defendants, and there can be no recovery against them therefor.

Another objection to such right of recovery, even if I am wrong in these views, exists, and which, I fear, is insurmountable, that is, that the act of employment of counsel by this committee is an executive act, which they were incompetent to perform. It must be quite within the recollection of those who have interested themselves in the affairs of the city government, that, prior to 1830, it was deemed a great evil, and one pregnant with most mischievous consequences, for the common council, or its committees, to exercise any executive functions. That charter provided, that the legislative power of the corporation should devolve upon the board of aldermen and assistants, and that those two boards should together form the common council

The 21st section of that charter declared that the executive business of the corporation should thereafter be performed by distinct departments, and which it was made the duty of the common council to organize and appoint for that purpose. These provisions would seem to have been so clear and specific, that their meaning could not have been misunderstood. Notwithstanding this express declaration of the legislature, that thereafter the executive business of the corporation should be performed by distinct departments, and the common council were enjoined to organize those departments, the common council still continued to perform executive duties, and neglected to organize the departments. This state of things induced the action of the legislature in 1849, when an amended charter was passed. By it, the executive departments were organized, the duties of each defined; and section nine thereof declared, that thereafter, "neither the common council, nor any committee or member thereof, should perform any executive business whatever." This inhibition is plain and specific, and would seem sufficiently certain to remove all doubts of its meaning and intent.

It was well observed in the case of *Christopher*, (*supra.*) that there may undoubtedly be some acts which do not come exclusively within either division of the powers of government, and which may, without violence to language, be classed under either head. But the common council have themselves given a practical construction to the meaning of this section, by the passage of an ordinance, permitting the counsel to the corporation to select such additional professional aid as he may deem requisite in the discharge of the duties of his office, with the consent of the mayor and comptroller. Now the plaintiff's assignor was not thus selected, but appointed to this duty by the special committee of the board of aldermen. I think it was one of the main objects of the legislature, in passing this charter, to divest the common council, its committees and members, of all patronage and business, other than legislative, with the exceptions contained in the charter; and that no contract like the one now under consideration, or employment, can create any legal liability upon the defendants. One of the executive acts condemned

by this court in the case of *Christopher*, (*supra*,) was the employment by the committee of the board of aldermen, of an architect to prepare the plans and drawings for the rebuilding of the Washington market. Peterson, the architect thus employed, commenced a suit against the corporation, to recover compensation for the services thus rendered, in the New York common pleas. That court held, that the employment by the committee of the board, did not create a valid contract, which was binding on the defendants, and gave judgment accordingly. I agree with the remark of the presiding judge of that court, in that case, that it, like the one now under consideration, appears to be a hard case for the plaintiff, and that it would be equitable that he should be compensated for the services which he has rendered; but the obstacles in the way of a recovery in an action against the defendants for such services, appear to me insurmountable.

Judgment for the defendants.

[New York Special Term, May 2, 1857. *Davies*, Justice.]

---

24 232
24 500
29 450
45 211
26a 471
57a 186

GRANT *vs.* COURTER, comm'r &c. of the town of Cobleskill.

The act of the legislature, authorizing the towns in the counties through which the Albany and Susquehanna rail road is located, and in progress of construction, to borrow money, and subscribe for, and purchase, the stock of the company, with the view of aiding in the completion of the work, is not repugnant to any *express* provisions of the constitution; nor is a prohibition upon the power exerted by the legislature to be necessarily *implied* from the provisions of that instrument.

The power exercised was within the general grant of legislative authority, and the act is a valid and binding law.

That act does not *deprive* any citizen of his property, nor *take* private property for public use, within the meaning of the constitution.

The meaning of the word *deprived*, as used in § 6 of art. 1, of the constitution, is the same as the word *taken*, in the same section; and when property is not seized and directly appropriated to public use, though it be subjected, in the hands of the owner, to greater burdens than before, it is not *taken* contrary to § 6.

Where a duty, in respect to a particular thing, is enjoined by the constitution upon the legislative branch of the government, and the mode of doing it is left exclusively to legislative discretion, even though the authority may have been previously exercised by the legislature, no limitation is thereby set to legislative power; nor can an intention be implied, on the part of the framers of the constitution, or the people who adopted it, to restrict the law-making department in the manner of discharging the duty.

An act granting power, to be exercised upon such conditions as the legislature impose, is not a delegation of legislative authority, nor is it invalid

IN March, 1856, an act was passed, entitled "An act to authorize any town in the counties of Schenectady, Schoharie, Otsego, Delaware, Chenango or Broome to subscribe to the capital stock of the Albany and Susquehanna Rail Road Company." (*Laws of* 1856, *ch.* 64.) The act provides among other things, that the commissioner in any of the towns in the counties aforesaid, shall borrow on the faith and credit of such town, provided the consent in writing of two-thirds of the tax payers, representing two-thirds of the taxable property in said town, appearing upon the last assessment roll, shall first be obtained, proof of which shall be by affidavit, filed in the town and county clerk's office, any sum not exceeding $100,000, for a term not exceeding twenty-five years, at a rate of interest not exceeding 7 per cent per annum, and to execute bonds therefor under his hand and seal. It is further provided that the commissioner may, in his discretion, dispose of such bonds to such persons or corporations and upon such terms as he shall deem most advantageous to said town, but for not less than par, and the money that shall be raised by any loan or sale of bonds shall be invested in the stock of the Albany and Susquehanna Rail Road Company, and the said money shall be applied and used in the construction of such rail road as aforesaid, and its buildings and necessary appurtenances, and for no other purpose whatever; and for that purpose the commissioner, in the corporate name of said town, may subscribe for and purchase stock of said company, to the amount thus provided for, and by virtue of said subscription; and upon receiving a certificate for the amount of said stock so subscribed, the said town shall acquire

all the rights and privileges, and be liable to the same responsibilities as other stockholders of said company.

It was further provided that the commissioner should report to the board of supervisors of the county wherein said town is located, within three days after the commencement of their regular annual session in each year, the amount necessary to pay the principal, or the interest, if any, on the bonds authorized to be issued. The dividends arising from the stock to be received by such commissioner and applied to the payment of the principal and interest which shall from time to time become due upon said bonds; and in case such dividends should not be sufficient to pay the principal and interest accruing on the bonds, it was made the duty of the board of supervisors to cause to be assessed, levied and collected upon the real and personal estate of said town, such sum or sums of money as shall have been reported to the board, which shall be necessary to make good such deficiency in the payment of the principal and interest upon said bonds.

The commissioner was also to provide, within five years from the time of issuing such bonds, for the annual payment of at least five per cent of the same, and for that purpose, should first apply the dividends, if any, or if not sufficient, the balance to be levied and collected as aforesaid, as a sinking fund for the ultimate redemption of the bonds. The commissioner was also authorized after acquiring such stocks to exchange the same in whole or in part for said bonds, or sell the same for cash, but for not less than par, except at public sale, of which notice should be given in two newspapers published in the county wherein such town is located, and in case of sale of said stock either at public or private sale, the proceeds thereof should be applied to the purchase or redemption of the bonds authorized to be issued by the act, and to no other purpose whatever.

The consent in writing of two-thirds of the tax payers representing two-thirds of the taxable property of the town of Cobleskill, in the county of Schoharie, upon the last assessment roll, was duly obtained, and proof thereof by the affidavit of the commissioner duly filed, as required by the terms of the

act, authorizing the commissioner to borrow on the faith and credit of the town the sum of $60,000 for a designated term, not exceeding 25 years, and at a designated rate of interest not exceeding 7 per cent per annum, and to execute bonds therefor, in conformity to the provisions of the act, and the commissioner proposes to borrow that amount on, or dispose of the bonds to be issued by him therefor, in accordance with the terms of the act, and invest the avails in stock of the Albany and Susquehanna Rail Road Company, to be applied and issued as therein directed. All the provisions and conditions contained in the act have been fulfilled.

Other towns in the counties mentioned in the act, are expected to subscribe to said stock in pursuance of said act, to the amount in all of $1,000,000, which with the individual subscriptions, and other means of the company, will be sufficient to build and equip the road. The company have expended upon the road between $200,000 and $300,000; they have obtained and paid for large and commodious depot grounds at Albany and Binghamton, and secured, free of all incumbrances, over 100 miles of the right of way. The whole distance (140 miles) has been surveyed and located, and about 25 miles of the most expensive portions are now graded, ready for the rails, and a considerable part of the mason work has been completed. All the towns along the line of the road, including Cobleskill, have a direct and immediate interest in the construction of the road, and it can be built at as small an expense as any other, for a corresponding distance, in the state. The portion of the state through which it is to pass, embraces an area of more than 4000 square miles, mainly off from the route of rail roads, and of canals or other navigable communications, without the facilities for intercourse with leading commercial marts, and for the sale of the products of agricultural and mechanical industry, common to other portions of the state. The construction of the road would greatly increase the value of the land along the entire line, and add largely to the aggregate of the taxable property of the several towns and counties through which it is to pass. It is conceded that the construction of the road will

greatly augment the aggregate wealth of the state, and that it will open to a large and populous region, now comparatively insulated, a direct communication with the capital, which has become indispensable to the convenience as well as the business interests of the citizens of this section of the state. The plaintiff, a tax payer of the town of Cobleskill, claims that the act of the legislature in question is unconstitutional and void, and prays that it may be thus adjudged, and that the defendant, as commissioner of the town of Cobleskill, be restrained from borrowing money on the faith or credit of the town; from executing bonds therefor; and from subscribing for, or purchasing in the name of the town, any stock in the Albany and Susquehanna Rail Road Company. The defendant, the commissioner of the town of Cobleskill, on the contrary insists that the act in question is free from constitutional objection; that the same is in full force and effect as a valid and binding law, and that the plaintiff is not entitled to the relief demanded or any part thereof.

Wm. J. Hadley, for the plaintiff.

John K. Porter, for the defendant.

By the Court, W. B. WRIGHT, P. J. The question submitted for our consideration is the constitutionality of the act, authorizing the towns in the counties through which the Albany and Susquehanna Rail Road is located, and in progress of construction, to borrow money and subscribe for and purchase the stock of the company, with the view of aiding a work, in a certain sense, a public improvement. (*Laws of* 1856, *ch.* 64.) The contemplated road running as proposed, through a populous though comparatively insulated region of the state, may be regarded as a work of public necessity; and it may well be, that from causes other than a distrust in the future profitableness of the enterprise, private capitalists have not promptly embarked their means. Yet regarding the question as one of expediency merely, serious doubts may well be entertained of the policy and wisdom of a town in a mainly agricultural county

where there is no unusual concentration of wealth, burdening itself even temporarily with a debt, and becoming a stockholder in a rail road corporation. Still, this question of expediency is not for us to determine. It pertains exclusively to the legislature. It has been definitively settled, by authorizing the towns both to incur the debt, and become stockholders. All that is left for our consideration is the question of legislative power.

It is not to be doubted that the legislature may empower a town to subscribe to the stock of a rail road company, with the intent of aiding in the construction of a work of conceded necessity to its inhabitants, and calculated to augment the value of its taxable property, unless the power be expressly, or by plain and necessary implication, withheld by the constitution. Any restriction upon the legislative authority, in this respect, is to be found in the organic law, or it has no existence. I am aware that what is called the natural right of the citizen, is sometimes invoked as a limitation or restraint on the law-making power. But this, under our theory of municipal government, is a fanciful and unreal restriction. The highest exercise of sovereignty, that of law-making, has been delegated to a senate and assembly. Each citizen, or member of the government, is a party to this delegation of power, insomuch that the people themselves cannot, in any other way, exercise the sovereignty. The people have invested a branch of the government with all the sovereignty they possessed themselves, in this respect, with only such limitations on its exercise, as they have thought wise to impose in the fundamental law. Nothing of the power has been retained, except so much as the people have evinced an intention to retain by express provisions of the constitution, or chart of goverment, or to be necessarily implied from that instrument. The act in question, therefore, is the fruit of the legitimate exercise of legislative power, unless repugnant to express provisions of the constitution, or such as are plainly and necessarily to be implied from it. It is urged that it is repugnant to the *spirit* of three distinct sections of articles seven and eight of the instrument; but an otherwise valid exercise of the law-making power cannot be unconstitutional, for the reason that the law is

antagonistic, in spirit, to certain provisions of the constitution, provided it be not in direct or necessary conflict with them.

The counsel for the plaintiff, starting with the assumption that the act appropriates, without just compensation, private property to a use either public or private, contends, that in this view, it is repugnant to those provisions of the constitution designed to guard the citizen against a deprivation of his property without due process of law, and which restrain the taking of private property for public use, without just compensation. (*Const. art.* 1, § 6.) He is, however, met at the outset, with the objection, that the statute in question does not *deprive* any citizen of his property, or *take* private property for public use, within the meaning of the constitution. A statute authorizing a town, in its corporate capacity, to borrow money on its credit, and with the avails to purchase and hold the stock of a rail road company, which road is a public improvement, designed for the public use, and in which the inhabitants of the town itself are to be especially benefited, even though the act contemplate, in a contingency, taxation to reimburse the debt, is in no constitutional sense, depriving a resident of the town of his property, or taking it for a public use, without just compensation. The citizen is not deprived of his property, nor is any taken from him for the public use, nor is the property of the local tax payer affected, except contingently and remotely. It is by taxation alone that harm can ever come to any person. I concur with the court in *Sharpless* v. *Mayor &c. of Philadelphia*, (9 *Harris*, 149.) that the meaning of the word *deprived* as used in § 6, of article 1 of the constitution, is the same as the word *taken* in the same section; and that when property is not seized and directly appropriated to public use, though it be subjected in the hands of the owner to greater burdens than before, it is not *taken* contrary to § 6. But the act imposes no tax. It is a mere grant of power to a corporate body to borrow money and apply it to a public purpose, which the legislature approves. If instead of authorizing the towns to borrow money, it had empowered them to raise it by taxing themselves for the purpose of opening the thoroughfare, I think it would have been equally free from

any constitutional objection. The exercise of the power of eminent domain and of taxation belong exclusively to the legislature. The latter is a legislative right and duty, to be exercised by the legislature or under the authority of laws passed by them, and limited only by their discretion. We are to be understood, of course, as referring to taxation for a public purpose, in which the community that pays the tax has an interest. If the Albany and Susquehanna rail road was a mere private affair, and the locality proposed to be taxed for its construction could have no possible interest in such construction, a more serious question of legislative power might arise. But it is a public improvement, which the state, to advance the commerce or promote the welfare of the people, might itself undertake, and declining to do it, permit it to be done by a company. The fact that it is done by a private corporation does not divest it of the character of a public work; nor, does the right of the corporation constructing it, to be compensated by the exaction of tolls for the transportation of freight and passengers upon it, extinguish the interest of the public, or make the work a merely private one. That insulated section of the state through which the contemplated rail road is to pass, and upon which taxation to aid in the construction might, in a contingency, ultimately fall, cannot be truly said to have no interest in the work. It is a local improvement, public in its character, to enure to the benefit of the locality from its use, in advancing its commerce, and augmenting its resources and wealth. It is a work which the state might aid in the execution of, by either delegating the right of eminent domain, or by an exercise of the taxing power. It is an improvement of such a nature and character, as the state has uniformly aided by delegating the exercise of the right of eminent domain, and not unfrequently by resorting to the power of taxation. There is nothing in the constitution prohibiting the legislature from exerting the taxing power for a public purpose upon a particular district or locality, or taking away from the legislative discretion the mode in which it shall be exerted. As was said in *The People* v. *Mayor &c. of Brooklyn*. (4 *Comst.* 419,) the remedy against unwise or unjust modes of taxation, is to be

sought from the legislative department of the government, and not from the judiciary.

The act, consequently, is not repugnant to the provisions of the state constitution above referred to, nor is it without the general grant of legislative power. The precise question at issue as to the power of the legislature to authorize towns, cities and counties, to subscribe for rail road, turnpike road, or bridge stocks, has been decided repeatedly in various states of the union, and the final decision in each of them, has upheld the law as constitutional. The constitutions of several of these states contain similar provisions for the protection of private property to those above alluded to. The only case in contradistinction to which we have been referred is that of *Clark* v. *The City of Rochester*, (13 *How. Pr. R.* 204,) decided at special term; and in which Judge Allen, in his able opinion, rests the decision in part upon other grounds, to which allusion will hereafter be made. (*Sharpless* v. *Mayor of Philadelphia*, 21 *Penn. R.* 147. *Commonwealth* v. *Mc Williams*, 11 *id.* 62. *The Cincinnati &c. R. R. Co.* v. *Commissioners of Clinton Co.*, 21 *Ohio R.* 77. *Cass* v. *Dillon*, 22 *id.* 607. *Talbot* v. *Dent*, 9 *B. Mon. R.* 526. *Slack* v. *The Mayville R. R. Co.*, 13 *id.* 1. *Nicoll* v. *Mayor of Nashville*, 9 *Humphrey*, 252. *Ryder* v. *Alton R. R. Co.*, 13 *Illinois R.* 516. *Shaw* v. *Dennis*, 5 *Gilman*, 405. *City of Bridgeport* v. *Housatonic R. R. Co.*, 15 *Conn. R.* 475. *Goddin* v. *Cramp*, 8 *Leigh*, 120. *Harrison Justices* v. *Holland*, 3 *Grattan*, 247. *Taylor* v. *Comm'rs of Newbern*, 2 *Jones*, 171. *See also Thomas* v. *Leland*, 24 *Wend.* 65; *People* v. *Mayor of Brooklyn*, 4 *Comst.* 419; *White* v. *The Syracuse and Utica R. R. Co.*, 14 *Barb.* 559.)

It is further urged that the law is opposed to the *spirit* of article 8, sec. 9 of the constitution, which enjoins the duty upon the legislature to restrict cities and incorporated villages in their power of taxation. in contracting debts, and in loaning their credit. In *Clark* v. *The City of Rochester*, Judge Allen held, that by a plain and necessary implication, arising from the terms of the section, the legislature was prohibited from conferring enlarged powers upon cities and incorporated villages, to

tax property, or loan their credit. It might perhaps be properly urged, that if the section, by implication, prohibits that species of legislation designed to enlarge the taxing power, and the power to loan the credit of cities and incorporated villages, the exercise by the legislature of the power under consideration, would not be affected by it. The act in question does not assume to extend the taxing power of cities and incorporated villages, as such, or their power of contracting debts. In terms, it has no relation to cities or incorporated villages, as such, but is confined exclusively to enlarging the capacity of those municipal organizations, or *quasi* corporations, denominated towns. But let this pass. The section is manifestly no restriction, in terms, upon legislative power; and it is only by a process of reasoning, more subtle than sound, that any prohibition is to be implied from its provisions. All that the clause of the constitution imposes on the legislature, is the duty of restricting the municipal corporations named therein, in their power of taxation, borrowing money, contracting debts, and loaning their credit, pre-supposing, and admitting, that the subject was entirely within legislative cognizance. No restraint upon legislative power, in this respect, was intended; nor can any be legitimately or necessarily implied. Instead of restraining legislation, by which city and village taxation for local purposes was authorized, it recognizes and affirms its validity, and refers the subject to the legislature to correct any abuses that may have grown out of the exercise of the power, under legislative authority, by municipal governments. The restriction contemplated was meant to be exclusively under legislative discretion and control, and to be effected by statute, and not by the organic law. Where a duty in respect to a particular thing is enjoined by the constitution upon the legislative branch of the government, and the mode of doing it is left exclusively to legislative discretion, even though the authority may have been previously exercised by the legislature, no limitation is thereby set to legislative power, nor can an intention be implied on the part of the framers of the constitution, or the people who adopted it, to restrict the law-making department in the manner of discharg-

ing the duty. No just or logical implication can arise, that in the section under review, it was intended to restrain the legislature, when dealing with the subject of municipal power, from conferring upon municipal governments new and enlarged powers, in respect to taxation, and the creation of debts, if, in its wisdom, good government and the welfare and interests of the community to be affected, were to be thereby promoted.

There is no force in the ground that the act is unconstitutional for the reason, that its adoption as a law was made to depend upon the consent being first obtained, of two-thirds of the tax payers, representing two-thirds of the taxable property of the town. This is not true, in fact, as will appear from an examination of the statute. Its adoption as a law was not made to depend upon the will of any person, or body, other than the legislature. No extraneous power, unrecognized by the constitution, was called in, or invoked, to give it being as a law. It was the emanation exclusively of the legislative will; and was perfect, final, and decisive, in all its parts, when it came from the hands of the law-making department. It was a grant of power, taking effect as a law, without reference to the question, whether the towns availed themselves of its provisions, or otherwise. It authorized the towns to borrow money, provided the consent of two-thirds of the tax payers, representing two-thirds of the taxable property of the towns, was first obtained; but this condition, or restraint, upon the exercise of the power conferred, was imposed by the legislature, and was as much the unaided emanation of its will, as the conferring of the power itself. An act granting power, to be exercised upon such conditions as the legislature impose, is no delegation of legislative authority, nor is it invalid. (*Moers* v. *City of Reading*, 21 *Penn. R.* 189. *Cincinnati R. R. Co.* v. *Commissioners of Clinton County*, 21 *Ohio R.* 77.)

The act, therefore, is not repugnant to any express provisions of the constitution, nor is a prohibition upon the power exerted by the legislature, to be necessarily implied from the provisions of that instrument. The power exercised was within the general grant of legislative authority. Each town, as a body corpo-

rate, has capacity to contract, to acquire property, and to exercise such other powers as may be conferred by law. The legislature could authorize a town, at its own election, to borrow money, and apply it to a public purpose beneficial to itself and useful to the state; and if the corporate capacity and power to do this did not previously exist, no constitutional objection intervening, it could be rightfully conferred by the law-making branch of the government.

We are of the opinion, that the passage of the act was not an unconstitutional exercise of legislative power; but, on the contrary, that it is in full force and effect, as a valid and binding law.

There must be judgment for the defendant.

[Albany General Term, May 4, 1857. *Wm. B. Wright*, *Harris* and *Gould*, Justices.]

Beale and others *vs.* Parish and others.

24 243
20a 407

Where the holder of a note, on its arriving at maturity, uses due diligence to ascertain the residence of the indorser, and sends notice of protest to the place designated as such, he will be entitled, as such holder, to recover against the indorser; although in fact, owing to misinformation, the notice was not sent to the right place. And a second indorser, who subsequently pays the amount of the note, to the holder, and thus becomes the owner thereof, stands in the shoes of the holder, and is subrogated to his rights. And this, although he himself knew where the indorser resided, at the time notice of protest was sent.

Thus, where the plaintiffs, being the holders of a note, before it fell due indorsed and transferred it to the C. Bank, and T., the notary of the bank, at the maturity of the note, demanded payment of it, and the next day inquired at the C. Bank where the first indorser resided, and was told they did not know; and he then gave the plaintiffs notice of non-payment and inquired of them where he should send notice to the first indorser, and was told that he resided either at Dunkirk or Buffalo, and was requested by them to send notice to him at both of those places, which was done accordingly; although the indorser in fact resided at C., and the plaintiffs knew that fact; upon the plaintiffs subse-

quently paying the note, at the bank, and becoming the holders thereof; *it was held* that they could maintain an action thereon, against the first indorser. PEABODY, J., dissented.

APPEAL by the defendants, from a judgment entered at a special term. The action was upon a promissory note, by indorsees against an indorser. The facts will be found in the opinion of PEABODY, J.

P. G. Clark, for the appellants.

J. C. T. Smidt, for the respondents.

ROOSEVELT, P. J. The bank having discounted the note became the holder of it; and the bank as such holder having used due diligence to ascertain the residence of the indorser, and having sent notice of protest to the place designated (although erroneously) as the residence of the indorser, was entitled as such holder to recover against the indorser. The plaintiffs, who paid the bank, (there being no pretense of intentional misrepresentation on their part,) stand in the shoes of the bank, and are subrogated to their rights.

The judgment of the special term, (MORRIS, J.,) in favor of the plaintiffs, should be affirmed with costs.

DAVIES, J. concurred.

PEABODY, J., (dissenting.) This action was brought on a promissory note, by indorsees against an indorser. The plaintiffs held the note prior to its maturity, and before it fell due, indorsed and transferred it to the Chemical Bank, who held and owned it when it fell due. Tallman, the notary of the bank, at the maturity of the note demanded payment of it, properly, and the next day inquired at the Chemical Bank where the defendant resided, and where notice of protest should be served on him, and was answered by the bank that they did not know. He then gave the plaintiffs notice of the non-payment and inquired of them where he should serve notice on the defendant, and

was told that the defendant resided either at Dunkirk or Buffalo, and was requested by them to serve notice on him at both these places, which he accordingly did. This information was erroneous. The defendant resided at Canandaigua, and the plaintiffs were aware that he resided there.

It is not pretended that the defendant actually received any notice of the non-payment, or that any such notice was sent to him at his place of residence. On the contrary, it is conceded that the notices sent were misdirected, and sent to places where he did not reside. To avoid the consequence of this failure to give due notice, the plaintiffs show that the note, when it fell due, was owned by the Chemical Bank, and that the bank by their agent, Tallman, the notary, used due diligence to ascertain the place of the defendant's residence, that they might send him notice; that he failed after the use of such diligence to ascertain it, and hence the failure and inability of the bank to give the notice. This reasonable effort on the part of the bank they say was equivalent to notice, as between the bank and the defendant, and fixed the liability of the defendant to the bank; and that they (the plaintiffs) having received the note from the bank after it became due, are subrogated to the rights of the bank. This reasoning would be correct if the plaintiffs had been strangers to the note until after it was due, and had then taken it from the bank as purchasers. They would then have taken all the rights of the bank against the defendant as they were fixed at the time of the purchase, and the bank having, by the use of due diligence to ascertain the residence of the defendant, fixed his liability as if notice had been given the plaintiff or any one else, being a purchaser from it, would acquire its rights against the defendant.

But the evidence shows that the plaintiffs indorsed the note to the bank, and consequently that they were parties to it before and at the time it became due; that they having indorsed it to the bank, and being themselves duly notified of its nonpayment by the maker, paid it and took it up as indorsers. The plaintiffs, therefore, did not take as purchasers from the bank, but by virtue of their contract as indorsers, made prior

to the maturity of the note. Their rights as holders, then, are to be determined with reference to this relationship, as created by their previous connection with the paper. As to the bank they were indorsers, and their liability to it was contingent only on demand of payment being duly made of the maker, and notice of the non-payment being duly given to them. These conditions appear to have been fulfilled by the bank, and the liability of the plaintiffs made absolute. The plaintiffs, in performing their contract as indorsers, by paying the bank, became entitled to it as holders, against the prior parties to it. What then was their relation to the defendant? This depends on the contract made by him when he transferred it. He indorsed it, either to the plaintiffs or some intermediate indorsee through whom they take it. As to the defendant, the plaintiffs were his indorsees and the defendant to them was an indorser. This is the contract originally made, and it remains as it was made. The rights of the plaintiffs, then, are those of an indorsee against his indorser, and arise from the original contract of indorsement, and not from a purchase by them from the bank. As indorsees of the defendant their rights against him were not absolute, but contingent on his causing a proper demand to be made and notice of non-payment. He, by indorsing, contracted with his indorsee and all subsequent holders, that if it was not paid at maturity, and payment was duly demanded, and notice of non-payment was duly given him, he would pay, instead of the maker.

The defendant had a right to notice of the non-payment, and any holder subsequent to him could give him that notice; and any one subsequent to him who wished to hold him was bound at his peril to give him the notice, if he could, with the use of reasonable diligence, do it. The plaintiffs could have given this notice, for they knew where he resided. They were notified of the non-payment in time for the purpose. They have failed to give the notice, and offer no excuse for the omission. But they say that the bank attempted to give it and failed, from want of the requisite knowledge. The bank, however, they say, used the requisite efforts and discharged their duty

and the defendant was liable to them. This is very probable. The law dispenes with the notice from a party who cannot ascertain how to give it, and as to such a party, the omission to give the notice does not operate to discharge the indorser. The inability of such a party excuses him. But the inability of one party does not excuse the omission of another who has the ability. The defendant would have been liable to the bank in a suit by them, but it does not follow that he is liable to the plaintiffs. The bank has done its duty in the use of diligence. The plaintiffs have not done theirs, and by their failure the defendant has lost the benefit of his notice. The law allows each party one day in which to notify any prior party of the non-payment. The plaintiffs were notified by the bank, in due time. They, if they wished to hold him, should have notified the defendant within one day thereafter, and his liability to them would thereby have been fixed. He in time would have notified the indorsers before him, if such there were, and have perfected his rights against them, and could have urged his claim against them or the maker, at once, and thus have made the most of any rights he might have had. He had a right to this notice from any one who would hold him liable. His failure to receive it may have caused him to lose his right of recourse to other parties. Prior indorsers may have been discharged by his omission to notify them. This notice may have been of vital importance to him, in various ways. The plaintiffs could have given it. They knew where he resided and could be served, and they must take the consequences of their neglect. But they did, perhaps, worse than omit their duty. They carelessly misdirected the notary who inquired of them, and who, for the purpose of giving the notice, was the agent not only of the bank, but of the plaintiffs themselves, and of any other party to the note who had an interest in having the notice given. Knowing where notice should be directed, they caused it to be sent wrong, by misinforming the notary.

If the bank, or any holder subsequent to them, had actually given the notice, it would have enured to the benefit of the plaintiffs or any other holder; but the bank's excuse for not

giving, to wit, inability, does not enure to the benefit of a party like the plaintiffs, to excuse them. They had the ability and could have given it. Having omitted to give it, the defendant is not liable to them.

Judgment affirmed.

[New York General Term, March 2, 1857. *Roosevelt, Davies* and *Peabody*, Justices.]

24 248
29 450
45 211
57a 186

Benson and others *vs.* The Mayor &c. of the city of Albany, and Robert Thompson, chamberlain of said city.

The act of March 18, 1854, authorizing the loan of the credit of the city of Albany to the Northern Rail Road Company, was an exercise of the legitimate power of legislation.

The exercise of this power was not "adverse to the spirit" of the constitution, so as to authorize the judicial tribunals to declare the act void.

There is no prohibition in the constitution against the exercise of such a power by the legislature.

The remedy for the evils, if any, which grow out of grants of power to municipal corporations to loan their credit is not to be found in appeals to the judicial tribunals, but must be sought through other channels.

On the 22d of April, 1857, the plaintiffs applied for a temporary injunction to restrain the defendants from paying the interest to become due on the 1st of May ensuing, on certain bonds issued by the corporation of the city of Albany, under an act of the legislature passed in March, 1854. The act in question authorized the mayor, aldermen, &c. of the city of Albany to loan the credit of the city, or to extend such aid as they should deem expedient, to the Albany Northern Rail Road Company, to an amount not exceeding $300,000, in such form and manner, and under such restrictions or conditions as the common council should prescribe. The act named commissioners to receive and apply the money for the purposes of the grant. Before the aid was given to the company, the commissioners were required to certify to the common council that such arrangements on the part of the company had been made,

as would, in their opinion, insure the performance of the conditions prescribed by the common council. The complaint alleged that, in pursuance of the authority thus given, the common council, in May, 1854, issued and delivered to the rail road company the bonds of the city, to the amount of $300,000. That the bonds were issued for the sole purpose of aiding the company in the construction of a rail road, *commencing in the city of Albany*, and extending north about thirty miles. That a mortgage was executed by the company to the city, to secure the payment of the bonds; that this mortgage was subject to two prior mortgages, exceeding in amount the whole value of the road; that the corporation of the city paid the semi-annual interest falling due upon the bonds in May and November, 1856; that the common council, in November last, directed their chamberlain to pay all the interest which should thereafter accrue and become due upon said bonds out of the city funds, and that he threatened to pay the interest which would become due on the first of May ensuing, unless restrained by an order of this court. The complaint further alleged that the plaintiffs were unable to state who were the owners or holders of the bonds, or of any of them, and therefore could not make them parties to the suit at that time. It also alleged that the issuing of the bonds was unauthorized by law, and that they were not obligatory upon the city, and that the common council had no right to order them, or the interest on them, to be paid out of the city funds. The plaintiffs prayed that the defendants might be perpetually enjoined from paying any part of said bonds, either principal or interest.

When the temporary injunction was applied for, an order was made requiring the defendants to show cause why it should not be granted. Copies of the order and of the complaint were served upon the defendants, but they did not appear, to show cause.

D. Wright, J. The defendants having failed to appear and show cause, I was at first inclined to grant a temporary injunction. But when I reflected that not one of the bond holders, the only persons having an interest in the suit, hostile to the

plaintiffs, was made a party, and that the interests of the plaintiffs and defendants, for aught that appeared to the contrary, were in perfect harmony—that they were indeed identical—I did not feel at liberty to grant it without giving the case as thorough an examination, and as careful a consideration, as my limited time would permit. Having done this, I have come to the conclusion that I ought not to grant an injunction. I should with great reluctance grant an injunction in any case to restrain the payment of a debt contracted according to all the forms of law, unless the creditor was made a party to the suit; and more especially where, as in this case, the debt was of a public character, and its non-payment involved the question of a breach of the public faith.

The 118th section of the code, which is merely declarative of a long established and well settled principle of law, provides that "any person may be made a defendant, who has, or claims an interest in the controversy, *adverse* to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein." To prevent inconvenience in the prosecution or defense of suits, on account of the multiplicity of parties, the 119th section provides that, "where the parties are very numerous, one or more may sue, or defend, for the whole." That a "complete determination, or settlement of the question involved" in this suit cannot be made, until at least some of the bond holders, the only persons, "who have an interest in the controversy adverse to the plaintiffs," are made parties, is a proposition too plain to be controverted. It is manifest therefore, that the court will never grant a perpetual injunction to restrain the payment of the bonds in question, or the interest to grow due thereon, until some of the bond holders are made parties to the suit, and afforded an opportunity to be heard, before their claims are pronounced invalid.

I am not prepared to say that a case might not be presented in which a temporary injunction should be granted to restrain the agent of the plaintiff from paying over his funds to the creditors who claim them, although none of the creditors were made parties to the suit, because they were unknown to the

plaintiff, and could not after diligent inquiry be discovered, leaving the plaintiff to make them, or some of them, parties at a subsequent period, as I think he certainly must do before a final decision could be made. But this is not such a case: the plaintiffs do not allege that they have made any effort to ascertain the names of any of the bond holders, although the agents they now seek to restrain, paid the semi-annual interest which became due in May and November, 1856, out of the city funds, facts of which the plaintiffs can hardly be presumed to have been ignorant at the times they occurred, as they state in their complaint that they have been residents of the city for many years past, and it is difficult to resist the conclusion, that by the exercise of reasonable diligence, some of the bond holders might have been discovered in season to have been made parties to the suit at its commencement, and been afforded an opportunity to show cause why a temporary injunction should not be granted.

But I have felt compelled to deny the application on other grounds than an omission to make the proper persons parties to the suit. I could not, consistently with the conclusions at which I have arrived, have granted the injunction, if all the bond holders had been made parties. I was referred, by the plaintiffs' counsel, to the decision in the case of *Clark* v. *The City of Rochester*, as an authority showing that the act under which the bonds in question were issued was unconstitutional, and conferred no power upon the common council of the city of Albany to issue them. I regret that I have been compelled to examine and to form an opinion upon so delicate and grave a question, unaided by the light which the discussion of it by counsel, presenting the views of the parties whose interests are adverse, could not fail to have afforded. In the absence of such aid, I have read and considered that case with great care, and with all the respect due to the opinion of the learned judge by whom it was decided, but I have been unable to concur in its conclusions, so far as they affect this case.

In 1851, the legislature passed an act authorizing the city of Rochester to borrow $300,000, and to issue its bonds for that

sum, for the purpose of enabling the city to subscribe and pay for that amount of stock in the Genesee Valley Rail Road Company. Justice Allen held that the act conferring this authority upon the city of Rochester was unconstitutional, and that the bonds issued under it were invalid. If I understand the reasoning of the learned judge, he seeks to establish the unconstitutionality of the law upon the following grounds:

1st. "The *absence* of any express power conferred by the people in the constitution," upon the legislature to pass an act of such a character.

2d. That the "*assumption*" and exercise of such a power by the legislature "*is adverse to the spirit*" of the constitution.

3d. That the constitution "*expressly forbids* the legislature to grant the power which the act in question assumes to confer upon the common council of Rochester."

By section 1st of the 3d article of the constitution, "the legislative power of this state shall be vested in a senate and assembly." It would seem to be difficult, after such a grant, to maintain the first of the above propositions, if the power exercised by the legislature in reference to the city of Rochester, falls within the province of legislative action. All the sovereign power of the people of the state except what is expressly reserved in the constitution, is by that instrument conferred upon the executive, legislative and judicial departments of the government. It will not be denied, that if the power in question exists, it is vested in the legislative department. That it is a power, coming within the province of legislation if not prohibited by the constitution, is proved by the concurrent testimony of almost every legislature that has assembled within the state since the formation of the first constitution, and its exercise has become more and more frequent, as the unexampled growth of the state and prosperity of the people have increased the necessity for its exercise. The people, from all sections of the state, have petitioned the legislature from year to year, for grants of authority similar in principle to that conferred upon the city of Rochester, and the power of the legislature to make such grants has never, until very lately, been seriously questioned in this

state. Not to allude to other instances, the city of Albany has, within a comparatively brief period, applied to and received from the legislature authority to extend pecuniary aid to no less than four different rail road companies, the Albany and West Stockbridge, the Albany and Schenectady, the Albany and Susquehanna, and the Albany Northern rail road companies. In three of these cases the city, through its municipal legislature, has acted upon the power conferred, and issued its bonds in pursuance thereof.

In the case of *The People* v. *The Mayor &c. of Brooklyn*, (4 *Comst.* 439,) Ruggles, J., says: "This system of taxation was in force at the time of the making and adoption of our first, second and third constitutions, and has stood in our statute books along with our constitutions, from 1777 until now. * * * If the *uniform practice* of the government from its origin, can settle any question of this nature, the power of the legislature to exercise this kind of taxation would seem to be established by it." These observations are as pertinent to the case before me, as they were to the case in which they were made. The cases are of a kindred character: both relate to the power of taxation. Strong as is the argument derived from a long and unvarying practice in favor of the inherent power of the legislature to legislate upon the subject in question, its existence has also been recognized and sanctioned by the judicial tribunals of this, and I believe every other state in the union in which the question has been presented for adjudication. Upon one or two occasions, within a few years past, this power has been questioned by some of the judges of our own state, previous to the decision of Justice Allen in the Rochester City case; but I believe that in every such instance, upon a review in the court of appeals, the power has been recognized, and the constitutional right of the legislature to exercise it affirmed.

In 1834 the legislature passed an act authorizing the canal commissioners to change the eastern termination of the Chenango canal from Whitesborough to Utica, on receiving satisfactory security for the payment into the state treasury of a sum equal to the estimated increased expense to be occasioned by

the change. Several citizens of Utica united in the execution of the required bond, and the proposed change was made. To relieve the obligors from their liability on the bond, the legislature, in 1835, passed an act directing the sum of $41,000 to be assessed upon the owners of real estate in Utica, that being the sum required to pay the increased expense caused by the change. The payment of this tax was resisted. It was insisted that the act authorized the taking of the property of one class of citizens for the benefit of another class, and that it was unconstitutional. Cowen, J., says, "the general purpose of raising the money by tax was to construct a canal, a public highway which the legislature believed would be a benefit to the city of Utica, as such; and independently of the bond, the case is the ordinary one of local taxation to make an improvement. But it is said that if the act had in view the construction of the canal, then it was unconstitutional as seeking to take private property for public use, without just compensation. To sustain this argument, it must be denied that the general profit of the community to which we belong, will warrant a tax affecting our property. One answer is, that *the improvement in question was, in itself, a compensation to the plaintiff.* Such was the view taken by the legislature, and they must be left to judge of the compensation. I admit, this power of taxation may be abused, *but its exercise cannot be judicially restrained so long as it is referable to the taxing power.*" (*Thomas* v. *Leland*, 24 *Wend.* 65)

The commissioners of highways of the town of Guilford, in the county of Chenango, by direction of the voters of the town, commenced and prosecuted a suit in their official character which was decided against them, subjecting them to the payment of a large bill of costs. The town having refused to reimburse the commissioners, they sued the town for the recovery of the costs which they had been compelled to pay in the first suit. Judgment was rendered against the commissioners in this suit, by the court of last resort, it having been held that they had no legal claim against the town for those costs. In 1851, the legislature passed an act authorizing the [illegible] of payment to

be submitted to the voters of the town. The voters decided that they would not tax themselves to pay the costs. In 1852, another act was passed authorizing the appointment of commissioners to ascertain and determine the amount of costs and expenses incurred by the commissioners of highways in both suits, and empowering the board of supervisors of the county to apportion the amount upon the taxable property of the town of Guilford, and to direct the collection thereof. The town of Guilford commenced a suit against the board of supervisors and the commissioners of highways, and in their complaint prayed for a perpetual injunction to restrain the defendants from proceeding to compel the town to pay the amount expended by the commissioners of highways in the suits referred to, upon the alleged ground that the law was unconstitutional. The court of appeals held the act valid. (3 *Kernan*, 143.) Dean, J., (p. 145,) after alluding to the limited powers of the federal government, says, "but our state government is an independent existence, representing the sovereignty of the people. The power of the legislature is the power of that sovereignty, and is supreme in all respects, and unlimited in all matters pertaining to legitimate legislation, except in those instances where the people have in their fundamental law, limited or restricted it. Taxation is indisputably a legislative power. The constitution of this state will be searched in vain for any clause which contains any restriction or limitation on the taxing power of the legislature. * * If it is feared that this power may be abused, or if it is in fact abused, *neither the apprehension nor the reality prove the non-existence of the power.*" Denio, J., (p. 149.) says, "the legislature is not confined in its appropriations of the public moneys, or of the sums to be raised by taxation in favor of individuals, to cases in which a legal demand exists against the state. It can thus recognize claims founded in equity and justice in the largest sense of these terms, or in gratitude or charity. Independently of express constitutional restrictions, it can make appropriations of money whenever the public well being requires, or will be promoted by it, *and it is the judge of what is for the public good.*"

The questions which have lately arisen under the prohibitory

act of 1855, and in relation to the validity of certain city assessments, have led to as critical an investigation, and as elaborate an examination by our highest judicial tribunal, of the constitutional power of the legislature over the rights of property, as was ever before bestowed upon that subject in the state. The result of that examination has been, I think, to establish beyond controversy, that the power to pass laws of the character in question in this suit, is a power vested in the legislative department of the government, and may be exercised by that department, unless the constitution prohibits its exercise.

In the case of *Wynehamer* v. *The People*, (3 *Kernan*, 428,) Selden, J., says: "Every sovereign state possess within itself, absolute and unlimited legislative power. While, therefore, the right of a sovereign state to pass arbitrary and tyrannical laws may, its legal *power* cannot be denied. I speak, of course, of a state as a whole, where all its powers are concentrated in the hands of the people at large, or of one or more of its members. It follows, that if a society, or people, wishing to form an organized government, should simply create the three essential departments, vesting the whole executive power in one, the legislative in another, and the judicial in a third, the legislative department could make any law which the people themselves could have made, arbitrary or otherwise. 'The legislative power of this state shall be vested in the senate and assembly.' This means of course, the whole legislative power. The words are general and unlimited; nothing is reserved. Why then, as it has been shown that the people could make any law, just or unjust, is not the legislature equally absolute? It is because by other clauses in the constitution, a portion of this absolute power has been transferred to the judiciary, not, it is true, in direct terms; but the constitution being the result of legislation by the people themselves before parting with their power, is the paramount law. When therefore, any law passed by the legislature conflicts with this, the judiciary pronounces between them, and the paramount law prevails. The law-making power has, and can have, no other limitation than such as is prescribed by the constitution. *The doctrine that there exists in the judi-*

ciary some vague, loose and undefined power to annul a law, because in its judgment it is contrary to natural equity and justice, is in conflict with the first principles of government, and can never, I think, be maintained." (*Id. pp.* 429, 30.) "The remedy for unjust legislation, provided it does not conflict with the organic law, is at the ballot box." (*P.* 432.) In the same case, page 410, A. S. Johnson, J., after remarking, that, in this state, all power is derived from the people, and that to the legislature they have intrusted the legislative power of the state, and after alluding to the restrictions in the constitution upon all the agents to whom they have committed the powers of government, adds, "in my judgment, legislative power is subject to no other control." Hubbard, J., at page 453, after remarking that the grant of legislative power in the constitution is general, proceeds to say, "what this is precisely, is not and cannot well be defined. Aside from the express limitations, it is believed to embrace all the common law power which the legislature would have possessed had the fundamental law remained as in England, a part of the unwritten law of the state." Comstock, J., at page 496, says, "I entertain no doubt that aside from the special limitations of the constitution, the legislature cannot exercise powers which are in their nature essentially judicial or executive. These are by the constitution distributed to other departments of the government. It is only the legislative power which is vested in the senate and assembly. But where the constitution is silent, and there is no clear usurpation of the powers distributed to other departments, I think there would be great difficulty and great danger in attempting to define the limits of this power."

In the case of *The People* v. *The Mayor &c. of Brooklyn*, (4 *Comst.* 425,) Ruggles, J., quotes the opinion of Chief Justice Marshall in the case of the *Providence Bank* v. *Billings*, (4 *Peters*, 514,) in which he says, "the power of legislation and consequently of taxation, is granted for the benefit of all. It resides in the government as part of itself, and need not to be reserved. This vital power may be abused, but the interest, wisdom and justice of the legislative body, and its relations

with its constituents, furnish the only security against unjust and excessive taxation, as well as against unwise legislation." At page 126, Ruggles, J., says, "assuming this, as we safely may, to be sound doctrine, it must be conceded that the power of taxation is vested exclusively in the legislature, unless this power is limited or restricted by some constitutional provision."

It appears to me that the second proposition upon which the decision in the case of *Clark* v. *The City of Rochester* is based, is equally untenable, and equally opposed to the principles established by the court of appeals in the cases above cited. The proposition is, that the "*assumption*" and exercise of such a power by the legislature is "*adverse to the spirit*" of the constitution. To maintain this proposition, the learned judge cites the following clauses of the constitution: No person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation. If these clauses were in fact intended to impose any such restriction as is here imputed to them, it is most manifest that their true meaning has not heretofore been correctly understood; for the former constitutions of the state contained provisions of a similar character, and yet, as has already been observed, there has been a uniform and unvarying practical disregard of their supposed intended restraining influence. The judge also cites in support of the second proposition that clause of the constitution which, in express terms, prohibits the state from in any manner giving or loaning its credit to, or in aid of, any individual, association or incorporation. It is certainly to be regretted, if the framers of the constitution *intended* to impose a restriction upon that department of the government to which was delegated the legislative power of the state, in order to prevent it from conferring upon municipal corporations authority to loan their credit or contract debts, that terms equally plain and unequivocal had not been selected to express such intent. The judge also cites sections 12, 13 and 14, of article 7 of the constitution under this branch of his argument. But as they relate to matters distinct from, and entirely independent of the question of legislative power involved in the Rochester

case, as well as in that pending before me, they have failed to convince me, that considered either alone, or in connection with the other clauses cited, they afford any aid in establishing the proposition they were introduced to sustain. It is hardly to be supposed that in the formation of so solemn and so well considered an instrument, as the organic law of a great state, designed both to confer sovereign power, and to restrict and limit its exercise, so as to prevent its abuse, if its framers intended to place the power in question in the class of restrictions, and not of grants, they should have so concealed and disguised that intent, as to render it necessary to search for it among provisions and restrictions relating to other subjects, leaving it doubtful whether, after the most diligent search, the true intent and meaning had, or had not been discovered. In my judgment, the latitudinarian construction of the constitution to which a search for its hidden and unexpressed meaning would unavoidably lead, would be fraught with consequences far more dangerous and alarming than those which grow out of unwise or improvident legislation.

The duty assigned to the judiciary, of defining the limits and establishing the boundaries of the powers conferred and the restrictions imposed upon the different departments of the government by the fundamental law, for the purpose of guarding against the abuses, and averting the evils arising from the usurpation of power withheld or restricted, is of too delicate and too important a character to be exercised except in cases free from all reasonable doubt, lest that department subject itself to the imputation of transcending the just limits of its own power, and committing the very abuses which it professes to restrain and correct.

Surely, no department of the government is under a stronger, or more solemn obligation to exercise its powers in such a manner as to secure it against affording any reasonable ground for such a charge, than that which possesses and exerts the power of restricting the action of the other departments within the limits of their legitimate constitutional authority, and is itself exempt from any direct supervisory control.

In the case cited from 3 *Kernan*, at page 391, Comstock, J., speaking of the difficulty of defining the limits of legislative power, says: "When theories alleged to be founded in natural reason, or inalienable rights, but subversive of the just and necessary powers of government, attract the belief of considerable classes of men, and when too much reverence for government and law is certainly among the least of the perils to which our institutions are exposed, I am reluctant to enter upon this field of inquiry, satisfied as I am, that no rule can be laid down in terms which may not contain the germ of great mischief to society, by giving to private opinion and speculation a license to oppose themselves to the just and legitimate powers of government." Selden, J., at page 453, says: "I am opposed to the judiciary attempting to set bounds to legislative authority, or declaring a statute invalid upon any fanciful theory of higher law, or first principles of natural right, outside the constitution. If the courts may imply limitation, there is no bound to implication except judicial discretion, which must place the courts above the legislature, and also above the constitution itself. This is hostile to the theory of the government. The constitution is the only standard for the courts to determine the question of statutory validity." T. A. Johnson, J., at page 477 of same case, says: "Should the time ever come when the courts, instead of sustaining and enforcing the legislative will, become forward to thwart and defeat it, and assume to prescribe limits to its exercise, other than those prescribed in the constitution, to substitute their discretion and notions of expediency for constitutional restraints, and to declare enactments void for want of conformity to such standards; or when to defeat unpalatable acts, they shall habitually resort to subtleties, and refinements, and strained constructions, to bring them in conflict with the constitution, the end of all just and salutary authority, judicial as well as legislative, will not be remote." In the case of the *People* v. *Cowles*, (3 *Kernan*, 360,) A. S. Johnson, J., after speaking of the practice which formerly prevailed both in the courts of this country and of England, of giving a strained and unnatural construction to statutes, to make the will of the law-

makers conform to the better judgment of the judges, a practice which he says has been abandoned, proceeds to remark: "Courts are not responsible that only wise laws shall be made; they have no power given them to judge of the wisdom of the legislature, nor to revise and alter that which has been enacted to be the law. If these principles are proper to restrain the action of courts in construing acts of the legislature, they certainly, with no less urgency, are applicable to constitutional provisions, which, from their greater importance and more permanent operation, must be supposed to have been framed with the utmost circumspection."

The remaining point of inquiry is, does the constitution *prohibit* the legislature from making grants of power of the character in question? It has been contended that the 9th section of the 8th article furnishes an affirmative answer to this question. It is in these words: "It shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment and borrowing money, contracting debts and loaning their credit, *so as to prevent abuses in assessments, and in contracting debts by such municipal corporations.*" Justice Allen makes the following comments upon this section: "A discretion is vested in the legislature as to the restriction, but none whatever in regard to the granting of new and enlarged powers, in respect to taxation and the creation of debts." Again he says, "It must be construed as an absolute restriction upon the powers of the legislature in conferring powers upon municipal corporations." If this be a correct exposition of the section in question; if the legislature are prohibited from granting to municipal corporations, any "*new and enlarged powers in respect to the creation*" *of a debt*, the act passed in 1850, authorizing the city of Albany to borrow money for the purpose of supplying the city with water, is unconstitutional, and the bonds issued under it are void, for it was both a new and an enlarged power; and it was the necessity for such a power that compelled the city to apply for, and the legislature to grant it; and it led to the creation of a debt, for under that grant the city issued its bonds t:

the amount of $600,000. It is true, that the learned judge had previously remarked, that the legislature might provide by law for all necessary improvements required by a city within the locality, and assess the expenses as a part of the public burden upon the community for whose benefit the expenses should be incurred, and that "this power might be delegated to the common council of a city, for the locality embraced within its boundaries." It is difficult to perceive how all this can be done under the supposed prohibition of the 9th section, for it concedes and necessarily involves the exercise of a *new and enlarged* power of taxation, and perhaps of contracting a debt, and that section makes no provision for necessary improvements, no exception in favor of the wants of *localities*. The only qualification which it contains is, that the power granted is to be restricted "so as to prevent abuse."

To construe the section under consideration as a *prohibition* upon the legislature against granting *any new and enlarged power*, appears to me to involve the incongruity of forbidding them to do at all, what they are explicitly required to do in a particular manner. Ruggles, J., in the Brooklyn case, (p. 440,) in speaking of the section in question says, "the direction given to restrict the power of cities and villages to make assessments, *presupposes and admits* the existence of the power to be restricted." The remark applies with equal force to the restriction of the power of contracting debts; it presupposes and admits the existence of such a power to be restricted. It may be asked, is there no remedy, if the legislature grant to municipal corporations the power of taxation and of contracting debts, and fail to impose the necessary restrictions to prevent abuses in its exercise? I am inclined to think that the character and extent of the restrictions to be imposed is, from the very nature of the case, entirely a matter of legislative discretion, and like all discretionary power, not the subject of review or reversal by any judicial tribunal. The constitution confers powers upon every department of the government which may be abused, and which no other department has the power to review or revise, and which can only be corrected by the su

pervisory power of the people at the ballot box; hence the necessity and the practice of frequent elections, which afford the only forum for the trial and punishment of many delinquencies. Ruggles, J., in the Brooklyn case, p. 432, says, "the remedy for unwise or unjust legislation is not to be administered by the courts. It remains in the hands of the people, and is to be wrought out by means of a change in the representative body, if it cannot be otherwise obtained. The constitution has imposed upon the legislature the duty of restricting the power of municipal corporations in making assessments and preventing abuses therein. To assume that this duty has been, and will be neglected, is a denial of that reasonable confidence which one department of the government ought always to entertain towards the others." Chief Justice Marshall, in the case of *Brown* v. *The State of Maryland*, (12 *Wheat.* 419,) says, "questions of power do not depend upon the degree to which it may be exercised; if it may be exercised at all, it may be exercised at the will of those in whose hands it is placed."

The opinions quoted in connection with the other points in this case will, it is believed, sustain the doctrine that the judiciary have no power to correct the errors of indiscretion, which the legislature may commit in the exercise of the power it possesses.

It might, I think, be conceded that an act conferring upon a city a general power of taxation and contracting debts, was unconstitutional if it contained no restrictions to prevent abuses in its exercise, and yet be shown that the act conferring the power in question upon the city of Albany, was a constitutional and valid act.

It is made the duty of the legislature "*to restrict*" the power of municipal corporations "so as to prevent abuses in assessments and in contracting debt." To restrict means to *limit*, to *confine*. The question then presented is, between conferring limited or unlimited, restricted or unrestricted power. It cannot be asserted with even the semblance of truth, that to confer upon a city the power to contract a debt in a single instance and for a specified purpose, is conferring unlimited and unre

stricted power. Indeed, it is impossible to conceive how the legislature could obey the injunction contained in the 9th section of the 8th article of the constitution, in a less questionable or more unexceptionable manner, than by reserving the general power which they are directed to restrict, in their own hands, and limiting their grants to such single instances, and such specified purposes, as in their judgment shall appear discreet and proper. To call this a grant of unlimited or unrestricted power, is confounding all distinctions in terms, and an unauthorized use of language.

As the result of my examination of the question involved in this case, I have arrived at the following conclusions:

1st. That the act of 1854, authorizing the loan of the credit of the city of Albany to the Northern Rail Road Company, was an exercise of the legitimate power of legislation.

2d. That the exercise of this power was not "*adverse to the spirit*" of the constitution, so as to authorize the judicial tribunals to declare it void.

3d. That there is *no prohibition* in the constitution, against the exercise of such a power by the legislature.

4th. And therefore that the remedy for the evils which a large and respectable class of citizens believe to grow out of grants of power to municipal corporations to loan their credit, is not to be found in appeals to the judicial tribunals, but must be sought through other channels.

Motion denied.

[Albany Special Term, April 22, 1857. *D. Wright*, Justice.]

THE PEOPLE *ex rel.* Fernando Wood *vs.* SIMEON DRAPER and others.

24 265
25 344

An injunction will not be granted for the purpose of restraining the defendants, generally, from exercising any of the functions of an office, during the pendency of a suit brought by the attorney general to determine their right to the office, and until the decision of the question as to the validity of the law under which they claim to hold.

MOTION to dissolve an injunction. The complaint of the plaintiff, by the attorney general, states that at the time of the passage of a pretended act of the legislature of this state, entitled "An act to establish a Metropolitan Police District, and to provide for the government thereof," on the 15th of April, 1857, the office of police commissioner was a public civil office in the city of New York, and that the office of head of said police department was and is a public civil office belonging to the office of mayor of said city, &c.; and that after that time, on the 22d of April, 1857, the defendants, as a pretended board of police, under said pretended act, without legal warrant, intruded into and usurped the offices of police commissioners and heads of the police department, &c., and from thenceforth exercised said office of police commissioners and head of police department, and also all the powers which, before the passage of said pretended act, were conferred upon said board of commissioners of police and upon the mayor &c. as the head of police, and which relate to or are connected with the police government, appointments and discipline, within said city, &c., and still do usurp and exercise said offices, and all the power and authority, &c., in violation of the constitution and laws of said state; and the plaintiffs pray the defendants may show by what warrant they claim to hold and use said offices, and they demand judgment against the defendants, that each of them be ousted from the power and authority aforesaid, and that said relator be declared entitled to hold and exercise all the power and rights of said police commissioner and member of said board of police commissioners, &c., as he of right ought to do under the laws of the state, existing and in force at the time

first above mentioned. There was also before the court an affidavit of the relator, to the effect that he is actually mayor of the city, and that by virtue of various acts, he is and has been head and chief executive of the police department, and as such, has custody and control of a large amount and number of station houses, telegraph apparatus, books and other property, real and personal, used for the police department; and also has the charge and direction of the whole police force and corps of about 1200 men. That the defendants have organized as a metropolitan police commission, under said act. That the deponent has been advised said act is unconstitutional and void; that he has been instructed by the common council to resist all action of the police commissioners, by an ordinance to that effect; and unless said commissioners are enjoined from proceeding under said act, and from asserting power over said police force, or the property of the department, the most serious consequences may ensue to the peace of the city; and that it is necessary to the rights of the deponent, and to the good order of the city, that said commissioners be enjoined until a decision can be had in the suit. On these papers an order was made by a justice of this court, restraining the defendants from exercising any of the functions of police commissioners, until the further order of the court.

On these papers, including the order, and affidavit of the defendants, that they have been severally nominated by the governor, and, with the consent of the senate, appointed commissioners under said act, entitled "An act to establish a metropolitan police district, and to provide for the government of the same," and that they have taken the oaths of office, and have the proper certificates of office, and that they have met and organized as a board; and that great and irremediable injury will be done by the continuance of the injunction; for that the complaint admits that the defendants are in office, and by the terms of the laws set forth in said complaint, the moment these defendants take office, all previous heads of police are abolished and that the funds for the support of police government will be devoted alone to the support of the provisions of the law under

which the defendants hold office, by the fiscal officers having charge of them—the defendants move to dissolve the injunction.

W. C. Noyes, F. B. Cutting, N. Hill, Jr., J. M. Van Cott D. D. Field, Mr. Vanderpool and *Mr. Evarts*, on behalf of the defendants and for motion.

C. O'Conor, J. W. Edmonds and *Theo. Sedgwick*, for the plaintiffs and opposed to motion.

PEABODY, J. In this case, which is in substance an action to determine the rights of the defendants to offices into which they have entered, the plaintiffs rely on the invalidity of the law under which the defendants have derived their appointment. They allege that the statute, by virtue of which the defendants claim that they now hold the offices, is in conflict with the constitution of the state, and therefore void; and being so, they ask judgment of this court to that effect, and that the defendants be ousted therefrom.

This is the ultimate relief sought in this action, and to this relief the plaintiffs seem to be entitled, if the law be, as they aver it is, unconstitutional. They also seek, however, the immediate aid of a temporary injunction, by which the defendants shall be restrained from exercising any of the functions of their offices, pending the litigation, and until the decision of the question as to the validity of the law under which they claim to hold. To this end they have presented their application to a justice of this court (ex parte, as is our practice) who, after hearing counsel on behalf of the application, has made an order restraining the defendants from exercising the rights or performing the duties pertaining to the offices as above stated.

This order the defendants now move to vacate, and they urge their motion on several grounds.

First. That the claim of the plaintiffs that the law is unconstitutional is not well founded, but that it is, on the contrary, consistent with the constitution and valid.

Second. That the remedy by injunction in an action of this kind is not authorized by law in any case.

Third. That if an injunction can issue at all in an action of this kind, the facts shown in this case are not sufficient to warrant it.

The first ground embraces the principal question at issue and to be determined in the suit—the constitutionality of the law—and inasmuch as that question will very shortly come before this court for decision, on the argument of the whole case made by the plaintiffs, it is quite proper that I should refrain from passing upon it now, unless it shall become necessary for me to do so in deciding this motion.

The second ground on which this motion is put is one which relates to practice, and having no bearing on the general proposition on which the final result of the suit depends, may be decided without reference to any thing by which that will be affected.

Is the relief by injunction allowed in an action of *quo warranto* by our practice, in any case? That there is no precedent for it in an action of this kind, is admitted on all hands. But the plaintiffs say that the absence of a precedent furnishes little or no ground for an argument against their position; that it is easily accounted for in a manner not inconsistent with their claim that it is now a legitimate remedy. And it is true, as argued by them, that prior to the time of our constitution of 1846, the only courts in which an action of this kind could be brought, were courts having only common law powers, and hence no court having cognizance of such a suit could administer the exclusively equitable relief of injunction. And it is also true, that until the time of our code of procedure (1848) suits of this kind were classed among and denominated criminal, rather than civil remedies, and courts of equity had a general rule of refraining from interference in criminal matters. Whereas, this court, as now constituted, has full chancery and common law powers, and having possession of this suit for general purposes, can aid the plaintiffs by injunction, if they are entitled to that aid; and since the code went into effect, (1848,) suits of this kind have been, and by law now are, classed among and denominated civil remedies; so that the rule that equity

will not interfere in criminal matters is no longer an obstacle to equitable relief in an action of this kind.

If, therefore, as the plaintiffs insist, the mere absence of machinery to grant injunctions in the courts in which alone suits of this nature could heretofore be properly brought, and the fact that remedies of this kind have been called criminal, are the reasons why relief by injunction has never hitherto been known, these reasons being done away, there would seem to be no longer any obstacle to that kind of relief. Actions of this kind, however, whose sole province is to decide the title to the office in question, really were no more criminal in their nature, purposes or effects, formerly, than they are now, although then called criminal and now civil. And equitable relief by injunction was then as well known, and as proper in principle, and as well adapted to the wants of litigants in this description of actions as it is now, although it was not, it is true, administered by the same court which had jurisdiction to try the case. Yet, if it had been then proper and desirable, it could have been had by application to a court of chancery, which had power to grant it in aid of the legal remedy, in a proper case. I am not satisfied that these reasons of convenience and habit of the courts suggested, are the real causes that this description of relief has never been known in this country or in England. On the contrary, I am inclined to look for reasons more substantial in their nature, and having better foundation in principle or policy.

I am inclined to think that such relief has not been deemed consistent with the interest of the state, with enlightened public policy, or with the general principles which must govern as to an office emanating from the sovereign power, and that hence it has never been adopted in practice; that the public welfare has been deemed to require that an actual incumbent of an office should not be forbidden to perform the duties of it for the time being, even though his title to the office were doubtful; that the public should not be deprived of the benefit of an office merely because it was uncertain whether the person in and ready to perform the duties of it were there

rightfully, even while the title of the party assuming to act should be in controversy. To restrain the action of the incumbent is to restrain all the functions of the office; for he being in—even if wrongfully—no one else can enter until he is removed, and he must act, or no one can And it is not at all difficult to see that in very many and most cases, the public interest would require that the duties of an office should not be suspended, and its functions cease, until the matter of personal right between rival claimants could be determined.

This, then, I take to be the reason that no cases of the kind are to be found in the reports; that the wisdom of the times has not approved of the principle on which such remedy is allowed, or has not deemed it discreet and consistent to adopt such a practice, and that therefore it has never prevailed. (*Thompson* v. *Commissioners of Canal Fund*, 2 *Abbott's R.* 248.) If this be the reason why cases have not occurred, the absence of precedent is important and entitled to weight in considering this question.

In this view I think I am sustained by the decision of the chancellor of this state, in *Tappan* v. *Gray*, (9 *Paige*, 507,) and by the judgment of the court of errors in the same case, reported in 7 *Hill*, 259. In that case the chancellor refused to interfere, even incidentally, pending litigation as to the title to the office, to protect the fund arising from the emoluments of the office, in favor of a plaintiff whom he pronounced entitled to it, against an insolvent intruder, exercising the powers and receiving the fees for the time being; and he put his refusal on the ground that the public interest required the duties of the office to be performed by the incumbent, whether in it rightfully or not; and with so much delicacy did he regard the interest of the public in the matter, that he declined to interfere even with the emoluments of the office, in which the public had no interest, lest such interference should interrupt incidentally the discharge of the duties of it, in which the public was interested. The court of errors (then our court of last resort) unanimously affirmed this decision; and so far as opinions were expressed, affirmed it for the same reasons given by the chancellor. At the time of

the adoption of the code then, (1848,) no such practice had ever been sanctioned, and the principle upon which, if at all, it must prevail, had been, not only thus negatively, but in the case I have cited, if no other, affirmatively repudiated.

But it is said that public officers have often been restrained in the performance of acts under the warrant of their offices. Doubtless they have been, and will continue to be, very properly, whenever the acts attempted are shown to be contrary to law, and in their nature such as to authorize the interposition of the court in that manner. But restraining a person from doing a particular act, because the act itself is not proper to be done, is a very different thing from restraining the entire functions of a public office, on the ground that, though the discharge of those functions is necessary to the public welfare, as it is by law declared to be, and no one else but the incumbent for the time can discharge them, still, as there is a doubt whether the incumbent is the proper person for the place, he shall refrain from acting and the public dispense with the benefits of the office until the question of title can be decided by the tedious process of law. It may very well be, and indeed there is no doubt, that a man, being a public officer, may be restrained in a proper case from doing a particular act of an official character, but it by no means follows that a public office may be restrained from dispensing its benefits to the public. That is a very different matter. The practical utility or benefit to the public of an office cannot be questioned before a court. The legislature, by creating it, have settled that question, and from that decision courts of justice entertain no appeal. The office itself is not only an emanation from sovereignty, but it represents and in a measure embraces the principle of sovereignty itself. Courts, therefore, will not undertake to restrain the action or operation of it, which they would in effect do if they should restrain generally the incumbent, he, of necessity, being for the time, the only person through whom the public can have the benefit of the functions of the office.

It is not, as I understand, pretended that this remedy has been given of late by any express enactment. There is no pre-

tense that it is expressly provided for in our present system of practice. The claim is rather that nothing in our present system forbids it, and that there is no good reason in the nature of things why this and the other provisional remedies in the code, arrest, &c. should not be available to a plaintiff in this suit as in others. I have endeavored to show that there is good reason why it should not exist in cases of this kind—that it is opposed to and inconsistent with principle, and an enlightened policy, and if I have succeeded in this effort, I have shown sufficient reason why its existence should not be inferred from the absence of any thing negativing the idea, and I might stop here. But a glance at the statute by which the present action of *quo warranto* was created to take the place of the former writ of the same name, and information in the nature of it, will not be unprofitable.

The first remark on the subject of this action, its uses and powers, is as follows: (*Code of Procedure*, § 428:) "The remedies heretofore obtainable in these forms [meaning writs of *quo warranto*, &c. which the preceding part of the sentence had abolished] may be obtained by civil actions under the provisions of this chapter." "*Remedies heretofore obtained in these forms* may be obtained, &c. under the provisions of this chapter." This remedy I have shown was not theretofore obtainable under the forms there referred to, and this language is far from suggesting that any new ones were to be created. Indeed, it not only says that the old ones may, but by implication it suggests that only those theretofore obtainable may be obtained under the provisions of that chapter. The language, to be sure, is affirmative—that certain remedies, viz: those theretofore obtainable in forms of action referred to might thereafter be obtained under the provisions of that chapter, but it is pregnant with the suggestion of a negative, that only those referred to can be obtained in the actions therein created (of which this is one) and hence that other remedies are not generally to be had thereunder.

Other sections of the code, in expressly providing for this and other of the provisional remedies in certain cases in this action, strengthen the presumption that neither this nor the other pro-

visional remedies are intended to be applicable to it except where they are expressly declared in terms to be so; and on the whole I am satisfied that it is not authorized by that system, in an action of this kind generally. (*See* § 435, *providing for arrest in certain specified cases, and* § 444, *&c.*)

The code affords many other evidences that its general provisions as to actions do not apply to the actions treated of in this chapter, to wit, *scire facias* and *quo warranto.*

It may be said that some of this reasoning does not apply to a case in which the validity of the offices is in controversy. It is not necessary that it should, for this is not such a case.

The existence of the offices is admitted, necessarily. in this suit, and the title of the defendants to them is alone in question. My conclusion is, that an injunction, restraining generally the functions of an office, in a case of this kind, is not authorized by law. The consideration of the other points made by defendants becomes unnecessary, in the view I have taken. The injunction must be dissolved.

[New York Special Term, May 5, 1857. *Peabody*, Justice.]

---

24 273
51 98
31 277
31 281

Chase *vs.* The New York Central Rail Road Company.

In an action brought to recover damages for injuries done to the plaintiff's house, grounds, fruit trees, &c., by water alleged to have been turned on to the plaintiff's land by the defendants, in constructing a rail road, it is proper to charge the jury that the rule of damages in that class of cases, is the difference between the value of the plaintiff's premises before the injury happened, and the value immediately after the injury, taking into the account only the damages which have resulted from the defendant's acts.

But it is erroneous to charge, in such an action, that the plaintiff, after the water was in her cellar, was bound to use *ordinary care and diligence* to prevent her house being injured thereby, and *only* ordinary care and diligence; and that if the damages to the house, complained of, or any part thereof, resulted from a neglect to use such care and diligence, the defendants are not liable for the damages thus resulting.

The owner of the house, under such circumstances, is bound to use reasonable

care, skill and diligence, adapted to the occasion, to save her house from being injured by the water, notwithstanding it came upon her premises by the fault or negligence of the defendants; or suffer the loss herself.

MOTION for a new trial, on exceptions taken at the circuit.

By the Court, MULLETT, J. Although the attorneys for the respective parties call themselves attorneys for the appellant and attorneys for the respondent, this is not an appeal. There is nothing in the papers showing that there was any judgment or order to appeal from, or any appeal pretended to be made. It is simply a motion for a new trial, on exceptions taken at the circuit. The judge who tried the cause, it is true, made an order that the defendants have time to make a case, or a bill of exceptions, and that the same be heard, in the first instance, at the general term; but the papers brought here, on which we are called upon to hear this motion, are the pleadings, the evidence, and the several exceptions taken by the respective parties, on the trial, to which is added the order of the judge above stated. There is nothing in the papers indicating that this was intended as a case on which to move for a new trial on the merits; and as the 265th section of the code, as amended in 1852, authorizes the judge trying the cause, at the trial, to direct only exceptions to be heard in the first instance, at a general term, this case must be heard and decided on the exceptions only.

This action was brought to recover damages for injuries done to the plaintiff's grounds, garden, fruit trees, &c., by water which it was alleged, was turned onto the plaintiff's land by the construction of the defendants' rail road, and it was also claimed by the plaintiff, that the water got into the cellar of her brick house and greatly injured the walls. In the course of the trial the defendants' counsel took several exceptions to the decisions of the judge in admitting the evidence offered by the plaintiff to show the amount of the injury done to her grounds, garden, fruit trees, &c. I have examined these exceptions, and am unable to discover any error in the rulings of the judge on

these subjects. The court, among other things, charged the jury that the rule of damages in this class of cases was the difference between the value of the plaintiff's premises before the injury happened, and the value immediately after the injury, taking into the account only the damages which had resulted from the defendants' acts. To this part of the charge the defendants' counsel excepted. This part of the charge, as a general proposition, is unexceptionable. It called upon the jury to decide, in the most practicable way they could, the real injury done to the plaintiff's property by the conduct of the defendants complained of, which was the question before them, but it applied to all the property alleged to have been injured, and all the injury done. The defendants' counsel, probably in order to obtain from the judge more specific and particular directions, in regard to the injury claimed to have been done to the house, "requested the court to charge, that it was the duty of the plaintiff, if the water in the cellar was caused by the flooding of the garden, to construct a drain from the cellar; and that if the injury to the house was occasioned by suffering the water to remain in the cellar beyond a reasonable time for the construction of such drain, the plaintiff would not be entitled to recover for such injury." The court declined to charge as requested. The judge was right in declining to state any particular means which it was the duty of the plaintiff to have used, to get the water out of her cellar, whether a drain, pumps or buckets. She was bound to use reasonable care, skill and diligence, adapted to the occasion, to save her house from being injured by the water, notwithstanding it came onto her premises by the fault or negligence of the defendants, or suffer the loss herself. On this subject the judge did charge the jury that the plaintiff, after the water was in her cellar, was bound to use ordinary care and diligence to prevent the house being injured thereby, and *only ordinary care and diligence*. That if the damages to the house, complained of, *or any part thereof, resulted* from a neglect to use such care and diligence, for the damages *thus resulting*, the defendants were not liable.

The defendants' counsel excepted, both to the refusal and to the charge, as above stated.

With great and sincere deference to the ruling of the learned justice who presided at the trial of this action, this part of his charge appears to me to be deficient in the perspicuity and definiteness so desirable in a statement of a rule of law given to a jury, as a guide on an important and somewhat intricate question of fact. The terms used by the judge, both to define and limit the duty of the plaintiff, in the use of means to prevent her own house being injured by the water, after it got into her cellar, were ordinary *care* or *diligence*. He said she was bound to use ordinary *care* and *diligence* for that purpose, and only *ordinary care* and *diligence*. The phrase "ordinary care or diligence," is used in a technical sense in the law of bailments, to express the degree or measure of responsibility assumed by a bailee who participates with the bailor in the benefits of the bailment. It is defined by Judge Story to be "that degree of diligence which men in general exert in respect to their own concerns;" or, he says, "it may be said to be the common prudence which men of business and heads of families usually exhibit in affairs which are interesting to them." (*Story on Bailments*, § 11.)

The term ordinary care or diligence, when appropriately used in its technical sense, is somewhat indefinite and uncertain, owing to the nature of the subject to which it is applied; but the danger of misunderstanding or misapplying it, will be increased by using it without its definition in connection with a subject to which it has no relation. It is not improbable that a jury, who are not presumed to know the technical meaning of the term ordinary care or diligence, might understand a judge who instructed them that a party, in a given case, was "bound to use that degree of diligence which men in general exert in respect to their own concerns," or to exercise that "common prudence which men of business and heads of families usually exhibit in affairs which are interesting to them," as giving a different instruction from the one who should tell them simply that the party was "bound to use ordinary care and

diligence, and only ordinary care and diligence;" and yet it is probable that the learned judge, in this case, meant the same thing. But the question is what did, or might, the jury understand from the charge, in the case to which they were to apply it? It appears to me that the principal error in the charge under consideration, if any, was in applying the rule of "ordinary care and diligence" to the case before the court, and making it both the measure and limit of the plaintiff's right of recovery. I cannot perceive that the rule, as a legal principle, had any thing to do with the case. There was no contract, express or implied, on which to base it. The case assumed that the plaintiff's house, without her consent, had been injured by the carelessness or negligence of the defendants, and she was entitled, by law, to be remunerated for that injury, by the persons who caused it, unless she contributed to bring it upon herself. It was unquestionably the plaintiff's moral duty, while the acts which occasioned the injury were in progress, to make a reasonable use, adapted to the occasion, in good faith, of all the skill and means in her power to prevent or diminish the injury; but I do not know that she was under a perfect moral or a legal obligation to do so, or that she could properly be said to be *bound* to *use ordinary care and diligence* in the performance of that duty, and that no more was required of her. After the causes which occasioned the injury were over, and the injury was done, her right of action for these injuries was perfect, and her damages were reduced, or might have been reduced, to a certainty. She still owned, occupied and possessed the house, and might amend or repair it when and how she pleased. She owed no duty to the defendants on that subject, to be governed by ordinary care or diligence; and that rule was not properly referred to on that occasion. I think that a new trial must be granted, for the reasons above suggested, with costs to abide the event.

[Erie General Term, January 12, 1857. *Marvin*, *Bowen* and *Mullett* Justices.]

24 278
31 65
38 23
46 561
11h 568
69a 550

HUMPHREY *vs.* HATHORN, sheriff &c.

In an action against a sheriff, for neglecting to collect or return an execution against property, although the measure of damages which the plaintiff is presumptively entitled to recover, is the amount due on the execution, yet the sheriff, on the trial, may prove that the defendant had no property, or not sufficient propreny out of which he could have satisfied the execution, by using the diligence required of him; which proof may be rebutted by the plaintiff, and thus the whole question as to what damages the plaintiff has sustained by the neglect of duty complained of, will be left open, to be settled by the jury.

What will amount to a permission, from the plaintiff's attorney, to a sheriff, to retain an execution in his hands beyond the return day, for the purpose of endeavoring to collect the amount; so as to afford a justification to the sheriff for omitting to collect the debt and return the execution within the time limited by law.

THIS was a motion for a new trial, founded on exceptions taken upon the trial at the circuit. The action was brought against the defendant as sheriff of Saratoga county, for not executing and not returning an execution, against property, delivered to him to collect. On the trial of the action at the circuit, the plaintiff proved a judgment in his own favor against the Empire State Mutual Insurance Company for $758.35, the roll of which was filed and the judgment docketed in Niagara county on the 30th of October, 1854. And that the said judgment was also docketed in Saratoga county, on the 2d day of November, 1854. It also appeared that an execution, in the usual form, was issued on the said judgment, by Chase & Farrell, the attorneys for the plaintiff, directed to the sheriff of Saratoga county, dated the 2d day of November, 1854, with an indorsement thereon, directing the sheriff to levy $758.35, with interest from the 30th day of October, 1854, besides his fees and poundage, and to return the said execution within 60 days after its receipt, to Niagara county clerk's office. It was admitted by the defendant that the execution was received by him on or about the 3d day of November, 1854, and thereupon the plaintiff rested.

The plaintiff put his right to recover on the ground that the defendant had neglected to levy on property liable to the execution, as he might have done, and on the ground that he neg-

lected to return the execution in 60 days after its receipt, as he ought to have done. The defense, both by the answer and the proof, was directed to those two grounds respectively. The first, fourth and fifth answers alleged that the defendant, within the life of the execution, levied on all the property of the insurance company liable to the execution, which came to his knowledge; and in the second and third answers, the defendant set up what he claimed to be a permission of the plaintiff's attorneys to him, to retain the execution beyond the 60 days, for the purpose of endeavoring to collect it. The proof tending to establish these several defenses, so far as it was presented by the exceptions, and considered necessary to their decision, is referred to in the opinion of the court.

By the Court, MULLETT, J. The action against a sheriff for not executing and returning an execution delivered to him, according to its command, is founded on the statute. (2 *R. S.* 440, § 77.) The statute makes the sheriff liable to the aggrieved party, for the damages sustained by him, but the form of the remedy, and the facts necessary to be stated in the declaration or proved on the trial, are not set forth. In the case of *Stevens and others* v. *Rowe*, (3 *Denio*, 327,) the supreme court held that an action on the *case* was the appropriate remedy, and that the particular grounds of damages on which the plaintiff seeks to recover, should be stated in the declaration, or the plaintiff should not be permitted to prove them on the trial. In the case of *Ledyard* v. *Jones*, decided in the court of appeals, in 1852, (3 *Selden*, 550,) that court declined to sanction the doctrine which made it necessary for a plaintiff in his declaration against a sheriff for not returning an execution according to its requirements, to state the particular grounds on which his claim to damages is founded; and also refused to adopt the rule which allowed a sheriff, in such a case, to mitigate the damages claimed by the plaintiff, by showing that the defendant in the execution still has property out of which it may be collected: and decided that in such an action, *prima facie*, the measure of the plaintiff's damage is the amount required to be raised by the

execution ; but that the sheriff may show in mitigation of these damages that the defendant in the execution had no property, or not sufficient property, upon which he could have levied to satisfy the execution, or any part thereof. By the rule laid down by this decision, as I understand it, in an action against a sheriff for neglecting to collect or return an execution against property, although the presumptive measure of damages which the plaintiff is entitled to recover, is the amount due on the execution, yet the sheriff may prove, on the trial, that the defendant had no property, or not sufficient property, out of which he could have satisfied the execution, by using the diligence required of him, which proof may be rebutted by the plaintiff, and thus the whole question as to what damages the plaintiff has sustained by the neglect of duty complained of, is flung open to be settled by the jury. This is the rule under which this action was tried. The facts relating to the ability of the insurance company to pay the execution out of its property, the power of the sheriff to collect it, and his misconduct in that respect, were put in issue by the pleadings and were the subjects of proof on the trial. This proof was submitted to the jury, and I see no reason for the defendant to complain of the decisions or charge of the judge in reference to these subjects.

The complaint of the plaintiff against the defendant for not returning the execution within 60 days after its receipt, is met by an allegation on the part of the defendant that after his receipt and before the return day of the execution, the plaintiff's attorneys directed him to do certain things in reference to collecting the execution, which they knew could not be performed within its life, and promised that for the delay occasioned by obeying such instructions they would not hold him responsible. The proof on this point shows that on the 18th of December, 1854, the plaintiff's attorneys wrote to the defendant, as follows: "*Dear Sir*, Will you probably be able to collect the amount of John Humphrey's execution agt. Empire State Mutual Insurance Company, by the time the execution runs out? Mr. Humphrey is owing some money, and he wants to know, so that he need not be disappointed in relation to his

business matters. Please answer the above, and much oblige. Yours, &c." That on the 25th of December, 1854, the defendant answered the above letter, as follows: "*Gents*, Yours of the 18th came duly to hand, and in answer to the probability of collecting the execution against the Empire State Mutual Insurance Company by the 1st of January, which is the time the sixty days expires, I do not think that I can get it by that time, but the secretary, Mr. Young, jr., and the treasurer, Mr. Pike, say that they will pay it as soon as possible, but will not be able to pay it as soon as the 1st of January. Shall I retain the execution or return it? I will act your pleasure." To which the plaintiff's attorneys replied, on the 28th of December, 1854, as follows: "Dear sir: Yours of the 25th is received. You have of course levied upon the safe and contents, and the personal property of the Empire State Mutual Insurance Company. We of course cannot give any directions which will in any way affect our lien upon the property. We wish you to send us a list of the property you have under the execution, and if you should advertise it for sale, send us word before you do so, that we may make arrangements to attend the sale. As to delay, we cannot give any time without risking our lien upon personal property. If the company will secure our claim, we shall be willing to give a short time to them, though our client is much embarrassed for the want of the money; but we are not now sufficiently informed to give any promise. Please write us on the receipt of this, and give us a list of the property you have levied upon. As for yourself, all we want is for you to do what you can to secure our debt, and to get it as fast as you can. You cannot, of course, give us the notice we wish and sell within the life of the execution. We shall make no claim against you for such delay in returning the execution. Resp. yours."

The 60 days in which the sheriff was required to return the execution, by the indorsement upon it, expired on the 2d day of January, 1855, yet the plaintiff's attorneys, within the life of the execution, and after they had been advised by the defendant, that it was not probable that he could get the money

by the expiration of the 60 days, but that the secretary and treasurer of the insurance company assured him that they would pay it as soon as possible, wrote to the defendant as sheriff, requesting him to do certain things in reference to the proceedings to collect the execution, which they knew, and acknowledged, must require him to retain it beyond its return day, and promised to make no claim against him for such delay in returning the execution. And also, in the same letter, wrote to the defendant that *all "they wanted was for him to do what he could to secure their debt, and get it as soon as he could."* The letter containing these instructions was dated at Lockport, December 28, 1854, and according to the time occupied in transmitting the letter to which this was an answer, this must have been received by the defendant before the return day of the execution, and while he had power to seize property, by virtue of the execution, if such seizure was desired or insisted upon by the plaintiff. But it is difficult to conceive how the plaintiff's attorneys could have given the sheriff more direct permission to retain the execution beyond its return day; at least long enough to make and send a list of the property he had under the execution, at any time within its life, to the plaintiff. The presumption of the plaintiff's attorneys that the defendant *had levied on the safe and contents, and personal property*, before the 28th of December, was not founded on any thing that the defendant had said or written, and did not release him from his duty to send the plaintiff's attorneys a list of the property he had taken under the execution, even though it may have been seized on the last day of its life. The learned judge therefore erred, under the circumstances of the case, in charging the jury that the several letters given in evidence *contained no authority to the defendant to hold the execution beyond the sixty days, and that the defendant was therefore bound to return the execution according to its command.* It is almost equally difficult for me to understand the latter part of the instructions contained in the letter of December 28, in any other way than as authorizing the sheriff to lisregard the strict directions contained on the execution, and to do what he could tc

secure the plaintiff's debt. The instructions are directed to the sheriff, and informed him that all that was wanted of him was for him to do what he could to *secure* the plaintiff's debt, and get it as soon as he could. This was certainly a modification of the directions indorsed on the execution, which required the sheriff to *levy* $758.35, *with interest from the 30th day of October*, 1854, *besides his fees and poundage, and to return the execution within* 60 *days after it's receipt;* especially as that instruction was given within five or six days of the expiration of the execution. I think the judge erred in his instructions to the jury in reference to this point too, and that the verdict must be set aside and a new trial granted, with costs to abide the event.

[Erie General Term, January 12, 1857. *Marvin, Bowen* and *Mullett*, Justices.]

Munn and others *vs.* Barnum.

A person selling stock to be delivered at a future day, may recover the price, upon a tender to the purchaser of the certificates of stock, with a power of attorney to transfer the same, and demand and refusal of payment, without an actual transfer of the stock into the name of the purchaser; where the purchaser, at the time of the tender, makes no objection for want of a transfer, but rejects the stock altogether, and refuses payment on any terms.

APPEAL, by the defendant, from a judgment rendered on a verdict recovered at the circuit. The action was to recover damages for the non-fulfillment of an executory contract by which the defendant agreed to purchase from the plaintiffs 223 shares of stock in a corporation called "The Association for the exhibition of the industry of all nations." The stock was to be delivered within six months from the date of the agreement, which was made April 13, 1854. The defendant having refused to accept, and pay for, the stock, at the expiration of the six months, and after the commencement of this

action, the same was sold at the board of brokers, by consent, and brought the sum of $264.84. By the agreement, the price of the stock was to be $71 per share; but in case any suit should be commenced by any person against the crystal palace association, the price was to be reduced to $66 per share. Such a suit having been commenced, the plaintiffs in this action recovered a verdict for the price of the stock at the latter rate

F. B. Cutting, for the appellant.

C. O'Conor, for the respondents.

By the Court, ROOSEVELT, J. On the 13th of April, 1854, Barnum, the defendant, agreed to purchase of the plaintiffs, within six months from that date, 223 shares of crystal palace stock, at $71 per share. The stock having subsequently become nearly worthless, Barnum refused to fulfill his engagement. On the trial of the cause, various difficulties were started, which being overruled by the judge, a verdict was rendered against the defendant for $15,234, which he now seeks to set aside.

The principal, and almost the only question, which needs to be particularly noticed, relates to the sufficiency of the tender. Mr. Barnum's residence, it appears, was at Bridgeport, but his place of business the museum in the city of New York. On the last day, accordingly, of the six months, the defendants, who had notified him by letter four days before, called on the defendant at his office in the museum. They found there a Mr. Greenwood, who had charge of the office, and producing the certificates of the stock, tendered them to him. He replied that Mr. Barnum was out of town, but would return on Monday; that he, Greenwood, had no instructions in regard to the matter, and declined to accept or pay for the stock. On the Monday following they called again, and seeing Barnum personally told him they had come to deliver the stock. His reply was, that he had foolishly entered into the agreement, relying on the joint responsibility of other parties, who

had since backed out, (naming Mr. Watts Sherman,) and that consequently (without stating any particular objections) he should decline doing any thing more than the law would compel him to do.

He now says—and it is the only point I deem it necessary specially to consider—that to make a good tender, the plaintiffs "were bound to have transferred and placed the legal title of the stock in the defendant;" but that instead of doing so, they "required him to pay for the same on receiving the simple scrip certificates, with a common power of attorney to transfer, which was in law revocable, (he does not say it was so in terms,) and could at any time have been revoked by the plaintiffs by their own acts, death, or otherwise."

He made no such objection, it will be observed, and suggested no such preliminary, when the stock was offered to him and payment demanded. On the contrary he rejected the stock altogether, and refused payment on any terms. His defense, therefore, now set up is in an afterthought. It has no merits, and its only basis, if any, is purely technical.

Is it, then—for that is the question—an unbending rule of law, that a person selling stock, on a valid contract, can only recover the price by first putting the stock in the name, and of course in the power of the purchaser; and that too, when the purchaser, at the time, expresses no readiness to pay, and no desire for a transfer in that or in any other mode? The answer to such a question is involved, as it seems to me, in the mere statement of it. Suppose the purchaser, after the making of the transfer by the seller on the books of the corporation, should refuse to pay, what would be the seller's remedy? An injunction would no doubt be granted; but of what avail would that remedy be against a second bona fide purchaser, to whom the party, in the interval, might have made a transfer for full value, without notice? On the other side, where was the difficulty in exchanging the papers simultaneously with the payment? The stock was transferable on the books of the company by the holder of the power of attorney; and it was not transferable by the giver of that power after he had parted

with the certificate. A "surrender of the certificate" was by it terms indispensable to a transfer of the stock, and such sur render could only be made by the party who had the certificate to surrender. As to a possible revocation of the power by death or otherwise, as suggested in the answer, it was purely imaginary. A power coupled with an interest cannot be so revoked; and when it comes to be executed, the transfer, if necessary, relates back to the date of the authority under which it was made. The answer of the defendant, as already stated, in effect admits, as matter of fact, a tender of the *power and certificate.* Such a tender of stock, in my judgment, is also sufficient in law in any case, but especially in a case like the present. Technical quibbles are not to be encouraged. They are inconsistent with the liberal spirit of modern times and of modern legislation. They are usually unjust, if not fraudulent, afterthoughts, suggested either by the desire of evading duty or of gaining time. "Six, nine and twelve months" (I quote from Barnum's letter of the 10th of November) was the proffered exaction in the present case. The defendant at one period, seems to have viewed them in that light himself. "It was, he wrote, with *sincere regret*, that he felt unexpectedly compelled, in accordance with the advice of his counsel, (his counsel, I imagine, had very little agency in the matter,) to contest the claim." All he wanted was time. Having gained that by the law's delay—having in fact gained more than three-fold what he asked—he would no doubt sincerely regret should he now be the means not only of contesting, but of defeating the plaintiff's claim.

Judgment for the plaintiffs affirmed with costs.

[New York General Term, June 6, 1857. *Roosevelt, Mitchell* and *Davies* Justices.]

GASPER *vs.* ADAMS and others.

24 287
10h 110

In an action upon a promissory note the answer set up the defense of usury. On the trial before a referee the usury was proved, but there was a variance between the proof and the answer, as to the parties to the usurious contract. The referee having reported in favor of the plaintiff, and a judgment having been entered upon the report; *held* that leave to amend the answer, so as to make it conform to the facts proved, could not be granted, except upon the terms of the defendant consenting that the judgment should stand for the amount admitted to be due the plaintiff, with interest and costs.

Sections 169, 170 and 171 of the code relate to the course to be pursued *at the trial* when a variance is alleged, and not to the mode of proceeding after judgment, and when the defendant can only as a favor, ask for an amendment.

Section 173 was intended mainly, if not solely, to allow amendments in order *to sustain* a judgment; not for the purpose of reversing it.

APPEAL by the plaintiff from an order allowing an amendment of the defendants' answer, to conform it to the facts found by the referee, and ordering a new trial before the same referee. The action was upon a promissory note. The defense set up in the answer was usury. The usury was proved. There was a variance between the proof and the answer as to the parties to the usurious contract. The referee was of opinion that, as referee, he could not disregard the variance, nor could he allow the answer to be amended. He found the facts specially, and reported, on the above grounds, in favor of the plaintiff, upon which report judgment for the plaintiff was entered. The defendants moved, under section 173 of the code, for leave to conform the answer to the facts proved and found by the referee, and for such other relief consequent upon such amendment as the court might deem it proper to grant. Upon the hearing of the motion the court made an order allowing the defendants to amend their answer so as to conform it to the facts found by the referee, and opening the said judgment for the purpose of allowing such amendment, and granting a new trial before the referee, and continuing the judgment and execution as security until further order, but staying all proceedings thereon until such further order. The terms of the amendment were the payment of the costs, amounting to $87. From this order the plaintiff appealed.

E. & E. F. Brown, for the plaintiff.

C. A. Seward, for the defendant.

By the Court, MITCHELL, P. J. The defendant pleaded usury, and the referee before whom the cause was tried was of opinion that there was such a variance between the usury alleged in the answer and that proved that he must disregard it. If he was wrong in this there was no need of any amendment, and the defendant's mode of relief should have been an appeal from the judgment entered on the referee's report. It must be assumed, on this motion, that the referee was right. The defendant moved to amend his answer, after the report was made by the referee, and judgment entered on the report. The court below allowed such amendment to be made, and the judgment to be opened for that purpose, on the defendant's paying $87 as costs.

Catlin v. *Gunter*, (1 *Kernan*, 368,) holds that variances between the proof and the allegations are to be disregarded *at the trial*, as much in usury cases as in any others. But that decision was there stated to be contrary to what the law formerly was, and to arise from the code, §§ 169, 170, 171. Those sections relate to the course to be pursued *at the trial* when a variance is alleged, and not to the mode of proceeding after judgment, and when the defendant can only as a favor, ask for an amendment. Section 173 applies to the last case. It is that the court *may*, before or *after* judgment, in furtherance of justice and on such terms as may be proper, amend any pleading in certain cases, "or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." This section was intended mainly (if not solely) to allow amendments so as to *sustain* a judgment; not for the purpose of reversing it.(*a*) But if it allows an amendment even in the last class of cases, it leaves it to the discretion of the court when to allow it and when not. And that discretion is to be exercised in *furtherance of justice*, and on such terms as may be proper. The language is, "the

(*a*) *Englis* v. *Furniss*, (3 *Ab. Rep.* 82.)

court *may*," not as in section 169, "no variance *shall* be deemed material," nor as in section 171, "it shall not be deemed a case of variance."

The case of *Catlin* v. *Gunter* acknowledges that the law had not, prior to the code, deemed it in furtherance of justice to allow a party to defeat a recovery for the amount actually due, by the defense of usury, unless he made his allegations conform exactly to the proof, and changes that rule only as to trials. It also notices that in that case the defendant was not applying for an *indulgence* as he is here. The same distinction was recognized, in effect, in *Schermerhorn* v. *The American Trust and Banking Company*, decided in the court of appeals, during the last year.

In *Wager* v. *Stickle*, (3 *Paige*, 408,) the chancellor, after showing that a default was satisfactorily accounted for, and that it was a matter of course to permit the defendants to make the defense on *equitable terms*, added, "but as the order to take the bill as confessed is technically regular, they cannot be permitted to insist on any grounds of defense which are in the nature of a penalty or forfeiture. They will not, therefore, be let in to a defense of *usury*, so as to deprive the complainant of the amount actually due, with legal interest thereon." Here, too, the plaintiff is strictly regular, and the defendant asks a favor in the discretion of the court to give or refuse, but which, when granted in the exercise of that discretion, can be granted only "in furtherance of justice, and on such terms as may be proper." It would be clearly against all the ideas of justice as entertained by the chancellor, to allow this defense to a party asking a favor, on any other terms than such as are above stated.

The order should be modified, so that the motion be denied if, on the defendant consenting that judgment remain for the amount admitted to have been due, with interest thereon and costs, the plaintiff consents to modify the judgment accordingly. If the defendant does not consent, the motion to be denied absolutely. Neither party is to have costs on this appeal.

[New York General Term, June 6, 1857. *Mitchell*, *Roosevelt* and *Peaody* Justices.]

21 290
42 483
42 487
20a 178

WHITE and others *vs.* HACKETT & SCHENCK.

When a special partnership becomes insolvent, and application is made by creditors for an injunction and receiver, a special partner is entitled to come in and claim as a creditor of the partnership, and to receive a dividend out of the assets thereof, *pro rata* with the other creditors.

APPEAL from an order made at a special term. The action was commenced by the plaintiffs, who were co-partners, as creditors of the limited partnership doing business under the name of Edward T. Hackett, in the city of New York, on behalf of themselves and of all others, creditors of the said limited partnership, who should unite with them therein, or who should come in and prove their debts under the judgment to be made therein, to restrain the defendants from disposing of the property and effects of the partnership; for the appointment of a receiver; and to have the effects of the partnership distributed among all the creditors ratably, except the special partner. The complaint set forth the formation of the limited partnership between the defendant Edward T. Hackett, as general partner, and the defendant John W. Schenck, as special partner, on the 3d day of January, 1854, pursuant to the statute, to continue for three years, and that, after the formation thereof, said partnership commenced and had ever since continued to transact business in the city of New York; that the limited partnership of the defendants had, at different times, become indebted to the plaintiffs in various sums, for money lent, goods sold and delivered, &c.; and that there were other persons and firms to whom and to which said limited partnership was indebted; that the partnership was insolvent and unable to pay its debts; that the plaintiffs had proposed to the general partner, but he had refused or neglected so to do, to place the effects of the partnership in the hands of a proper and responsible trustee, to be distributed among the creditors of the partnership, other than the special partner, ratably in proportion to the amount of their debts, either due or to become due, and the special partner had refused to assent to such dis-

position. The complaint prayed the judgment of the court that the assets and effects of the partnership be distributed among the plaintiffs, and all the other creditors of the limited partnership, excepting the said special partner, who should come in and prove their debts, &c., for an injunction, and the appointment of a receiver, and for other or further relief, or both. The defendant Hackett did not put in any answer to the complaint. The defendant Schenck put in an answer admitting the formation of the special partnership, and that he was the special partner therein. He also admitted that the plaintiffs were creditors of said firm, as alleged in the complaint; and that said firm was largely indebted to divers persons and was insolvent. The defendant also alleged, that to meet the urgent wants of the general partner in conducting the business of the firm he, the defendant, loaned to him, the said general partner, various sums of money from time to time, amounting in the aggregate, including interest, to $8,409.80; and he claimed that he was a creditor of said firm to that amount, for money loaned. And he prayed that in all distributions of the funds or assets of said firm, the receiver to be appointed might be directed to pay to him his proper dividend *pro rata*, with the other creditors of said firm, out of the assets thereof, and on the amount so loaned by him with interest, and his costs in this action.

The judge, at special term, decided against the claim of the special partner, and the latter excepted and appealed from the decision.

W. H. Anthon, for the appellant

C. Van Santvoord, for the respondents.

By the Court, DAVIES, J. The question presented for consideration in this case is, whether a special partner can come in and claim as a creditor of the partnership, until all the other creditors are paid. I think he can; and that such was the weight of authority previous to the late act of the legisla-

ture.(*a*) Viewing that act as but declaratory of the law, the judgment of the special term should be reversed.

Such, at any rate, is the will of the law-making power; and that is obligatory upon us.

Judgment accordingly.

[New York General Term, June 6, 1857. *Mitchell, Roosevelt* and *Davies*, Justices.]

(*a*) 2 R. S. 763, Title relative to limited partnerships.

Bush, administrator &c., *vs.* Hibbard.

H. drew a draft upon McB. as follows: "On demand after date deliver to the order of J. A. B. one hundred gross of inlaid mosaic knobs worth five dollars per gross, and charge same to the account of" &c. Underneath this order was the following guaranty, signed by H. the drawer: "For and in consideration of one dollar to me in hand paid, receipt whereof is hereby acknowledged, I guarantee the delivery of the above knobs as per order to Mr. B. as per agreement with Mr. McB." This order was accepted by McB. On the same day, H. gave to B. a receipt in these words: "Received, New York, April 8, 1846, from A. McB. his acceptance of a draft on demand for one hundred gross of mosaic inlaid knobs, which I promise to deliver to J. A. B. or his order, upon his ceasing to transact business for said McB. according to an agreement bearing even date herewith, and upon the finding any balance due the said B. from the said McB., according to the tenor of said agreement." In an action brought by the administrator of B. against H. to recover possession of the draft, acceptance and guaranty, the complainant alleging a demand and refusal; *it was held*,

1. That the draft and guaranty formed but one undertaking on the part of H., viz: that McB. should deliver to B. on demand 100 gross of knobs at $5 per gross; and that if McB. did not deliver the knobs, or any part thereof, H. should make up the deficiency.
2. That H.'s agreement to deliver to B. the draft and guaranty on the cessation of the business and the finding a balance due from McB. to B. did not in any degree extend his liability; it being but an engagement on his part that on the happening of those contingencies B. should be put in possession of the securities, and be at liberty to enforce any claims he might have on H. by reason of them.

3. That H. having refused to deliver the draft and guaranty, on demand, the value thereof to B. was the rule of damages
4. That upon McB.'s delivering to B. certain substituted articles in the place of the knobs, and B.'s acceptance thereof, the engagement of H. was complied with, and there could therefore be no recovery against him upon the draft and guaranty.
5. That consequently B. had sustained no damage by the refusal of H. to deliver to him the draft and guaranty on demand.

ON the 8th of April, 1846, the defendant drew a draft on McBurth, which was accepted by him, as follows: "On demand after date deliver to the order of John A. Bush one hundred gross of inlaid mosaic knobs, worth five dollars per gross, and charge same to the account of, respectfully, T. R. Hibbard." Underneath such order, and as forming a part thereof, was the following: "For and in consideration of one dollar to me in hand paid, receipt whereof is hereby acknowledged, I guarantee the delivery of the above knobs as per order to Mr. Bush, as per agreement with Mr. McBurth. T. R. Hibbard." On the same day the defendant gave to Bush a receipt in these words: "Received, Newport, April 8, 1846, from Augustus McBurth, his acceptance of a draft on demand for one hundred gross of mosaic inlaid knobs, which I promise to deliver to John A. Bush, Esq. or his order, upon his ceasing to transact business for said McBurth, according to an agreement bearing even date herewith, and upon the finding any balance due the said Bush from the said McBurth, according to the tenor of said agreement." This suit was brought to recover the possession of the said draft, acceptance and guaranty; the complaint alleging demand and refusal of the defendant, and claiming $700 damages by reason of such refusal.

After the cessation of the business between Bush and McBurth an accounting was had between them, and a balance found due Bush of $541.26. The cause was referred to Wm. Bliss, Esq. referee, and he reported in favor of the plaintiff to the amount mentioned in the draft, being $500 and interest. From the judgment entered on his report an appeal was taken by the defendant.

H. B. Cowles, for the appellant.

W. S. Sears, for the respondent

By the Court, DAVIES, J. The referee clearly erred in the view he has taken of the engagement of the defendant. The draft and guaranty form but one undertaking on his part—that McBurth shall deliver to Bush on demand one hundred gross of knobs, at $5 per gross. If McBurth did not deliver the knobs or any part thereof, then by the terms of the draft and guaranty the defendant was to make up the deficiency. His agreement to deliver to Bush the draft and guaranty on the cessation of the business, and the finding a balance due from McBurth to Bush, does not in any degree extend his liability. It is but an engagement on his part, that on the happening of those contingencies Bush shall be put in possession of those securities, and be at liberty to enforce any claims he may have on the defendant by reason of them. The defendant having refused to deliver them on demand, the value of them to the plaintiff became the rule of damages in this case. It becomes, therefore, necessary to ascertain what, if any thing, could the plaintiff recover against the defendant upon the draft and guaranty. We have seen by it, that the defendant became responsible that McBurth should deliver to Bush on demand 100 gross of knobs, of the value of $5 per gross.

The testimony clearly shows that McBurth did deliver a portion of the knobs, and that for the residue Bush agreed to accept and did accept and receive from McBurth "quartette tops, light stand tops, and checker board tops in lieu of the knobs named in the contract." Bush waived the agreement for the delivery of the knobs, and took other articles as a substitute therefor. This it was entirely competent for him to do, and on McBurth's delivery to him and his acceptance of the substituted articles, the engagement of the defendant was complied with. There could therefore be no recovery against the defendant upon the draft and guaranty, and it follows that the plaintiff has sustain

ed no damage by the refusal of the defendant to deliver to him on demand the draft and guaranty.

The plaintiff's right to demand the draft and guaranty from the defendant by the tenor of the receipt of April 8, 1846, did not accrue until the finding of a balance due to Bush from McBurth. This was not ascertained until the accounting which took place between them on the 16th June, 1849. The suit in the common pleas was commenced before such settlement and adjustment took place and balance ascertained. Consequently it was premature, and the rights of the parties could not be passed upon by that court. The referee therefore properly held that that suit was no bar to the present action.

The report of the referee, and the judgment thereon, must be set aside and a new trial granted; costs to abide event.

[New York General Term, June 6, 1857. *Roosevelt*, *Mitchell* and *Davies*, Justices.]

Wilson *vs.* Mathews.

24 295
46 188
56 442
34a 495

In an action to recover damages for an unlawful conversion of the plaintiff's property, the rule of damages is, the highest value of the property at any time between the act of conversion and the day of trial. Roosevelt, J., dissented.

In such an action the plaintiff cannot recover as special damages the costs and expenses of an unsuccessful suit against a person to whom the defendant had delivered the property.

THE plaintiff, in 1851, residing in Niagara county in this state, forwarded to the defendant, residing at Oswego, wheat to be by him forwarded to Moore, Tibbitts & Co. of Troy. The defendant did not forward all that he received, but sent 700 bushels and 39 pounds to one Nason. The plaintiff called on the defendant for the wheat thus converted, and the defendant stated that he had sent the same to Henry Nason, of this city. Thereupon the defendant assigned and

delivered to the plaintiff the bill of lading for said wheat, and an order on Nason to pay over to the plaintiff the proceeds of the wheat. Nason, on demand, declined either to deliver the wheat or pay over the proceeds; whereupon the plaintiff commenced a suit in the superior court, against Nason, and such proceedings were had therein, that judgment was rendered for the defendant. On the 21st of July, 1854, the plaintiff paid the defendant's costs in that court, amounting to $234.99, and his own costs therein, being $501.47; the total $736.46. The plaintiff thereupon commenced his action in this court, and claimed to recover of the defendant the highest price which said wheat had attained since the conversion thereof, being $2.75 a bushel, and amounting to the sum of $1986.87; and claimed to recover as special damage, the costs and expenses in the suit in the superior court, brought against Nason.

A verdict was taken at the circuit, for the whole sum claimed by the plaintiff, subject to adjustment by this court, or to render judgment for the defendant, as the court should be advised.

H. H. Stuart, for the plaintiff.

Jas. Humphrey, for the defendant.

DAVIES, J. The main point in controversy between the parties is, what is the rule of damages to be adopted in this case? The plaintiff contends that the true rule is the highest price of the article converted, at any time between the act of conversion and the time of trial; while the defendant contends that the rule is, the value of the article converted, at the time of conversion.

The rule as contended for by the plaintiff, is certainly that which has been laid down by the highest court of this state as applicable to a refusal of a bank to permit a transfer of stock, to which the party was entitled. (*Com. Bank of Buffalo* v. *Kortright*, 22 *Wend.* 356.) And the court adopt this rule on the authority of *West* v. *Wentworth*, (3 *Cowen*, 82.) where that court adopted the rule laid down by Judge Grose, in 2

East, 211, that "the true measure of damages in all these cases is that which will indemnify the plaintiff for the breach."

The case of *West* v. *Wentworth*, was an action on a note payable in specific articles, not delivered. And it was held that the measure of damages was the highest price of those articles at any time betwen the note's falling due, and the time of trial. The case in 3 *East*, was an action upon a contract to replace a quantity of stock on a given day, and it was held that the plaintiff was entitled to recover the highest value of the stock as it stood at the time of the trial, and not its value on the day when it should have been delivered. Grose, J., in addition to the remark quoted above, says, "If the defendant neglect to replace the stock on the day appointed, and the stock afterwards rise in value, the plaintiff can only be indemnified by giving him the price of it at the time of the trial, and it is no answer to say that the defendant may be prejudiced by the plaintiff's delaying to bring his action; for it is his own fault that he does not perform his engagement at the time." *Cortelyou* v. *Lansing*, (2 *Caines' Cases in Error*, 216,) was relied upon by the court as sanctioning the doctrine of *West* v. *Wentworth*. That was an action of assumpsit, brought by the representative of a pawnor against the pawnee of a depreciation note, which the pawnee had sold before application to redeem, and it was held that the plaintiffs were entitled to recover the value of the note at the time of the application, and not at the time of the pledge.

The court in the case of *West* v. *Wentworth* say, that the same rule holds in trover, and that if the chattel be not of a fixed and determinate value, its worth at the time of conversion is not the rule of damages, but they may be enhanced according to the increased value of the chattel subsequent to that time. And the case of *Fish* v. *Prince*, (3 *Burr.* 1363,) and *Whittier* v. *Fuller*, (2 *Bl. Rep.* 902,) are cited as authority for this position. These cases sanction the doctrine they are cited to sustain. This whole doctrine is ably reviewed by Justice Sutherland in the case of *Clark* v. *Pinney*. (7 *Cowen*, 681,) and we are not aware that the authority of this case has ever

been questioned by the courts of this state. It is sufficient for us that it is the law of this court, and we see no reason either upon principle or authority, for departing from it, or seeking to weaken its force.

Judge Sutherland, in delivering the opinion of the court, says, "If he, (the plaintiff,) immediately or without any unreasonable delay, commence and prosecute his action, we think it just and proper that the fluctuation in price should be exclusively at the hazard of the defendant, the plaintiff having done every thing in his power to have the contract settled and adjusted, and which is prevented solely by the laches and default of the defendant. In such a case, therefore, the plaintiff is entitled to the highest price between the day when the delivery should have been made and the day of trial. But when he delays the prosecution of his claim, beyond the period which may be considered reasonable, for the purpose of endeavoring to make an amicable arrangement, he must be considered as assenting to the delay, and ought to participate in the hazard of it."

In the case at bar, the plaintiff lost no time in demanding of the defendant his wheat, and it was to accommodate the defendant, and for his benefit, that he sought out Nason, to whom the defendant had sent it. The suit against him was promptly commenced, in January, 1852, and on its adverse termination in July, 1854, this suit was commenced. As no objection was taken on the argument, that any delay had intervened, we assume that the plaintiff has not delayed the prosecution of his claim, beyond the period which may be considered reasonable, and that, therefore, the proper rule of damages is the highest value of the property at any time between the day of its conversion and the day of trial. No other rule can afford him full indemnity for the defendant's default, and this he is entitled to receive. (*See also Sedgwick on Damages, p.* 479.)

The next point for consideration is, whether the plaintiff can recover as special damage the costs and expenses in the suit against Nason. As this suit was not prosecuted at the request of the present defendant, nor as we see for his benefit it is

difficult to perceive upon what principle the plaintiff is entitled to recover those expenses of this defendant. They do not come within the case of *Bennett* v. *Lockwood*, (20 *Wend.* 223.)

In this case, as in that, the damages are duly claimed and if they were such as the plaintiff was entitled to recover, there could be no difficulty in that respect.

These costs and expenses were not such as the plaintiff was put to in the use of reasonable means on his part to repossess himself of his property; neither were they occasioned by the wrongful act of the defendant. I do not see that the plaintiff is entitled, on any principle, to recover them of this defendant, and the verdict of the jury must be accordingly modified, by deducting therefrom the amount of such costs and expenses, and judgment for the plaintiff on the verdict, for the balance with costs.

MITCHELL, J. I concur, on account of the authorities in favor of the plaintiff. A rule which is to fluctuate through a series of years can hardly be called a rule. In principle, the measure of damages should be the value at the time of the conversion, or of the commencement of the suit. But the authorities allow the highest price at any time before the trial, where, as in this case, the defendant holds the plaintiff's money or goods. The verdict should be modified according to the above opinion of Justice DAVIES.

ROOSEVELT, J., dissented.

Verdict modified by deducting amount of costs and expenses in suit against Nason.

[NEW YORK GENERAL TERM, June 6, 1857. *Mitchell*, *Roosevelt* and *Davies* Justices.]

THE SECOND AVENUE RAIL ROAD COMPANY *vs.* COLEMAN.

The duty of a treasurer is to keep the moneys of his principal distinct from his own, unless it is otherwise agreed, and to pay any balance due, on demand.

And even if it be the rule that he cannot be indebted until a demand be made of him, an allegation in the complaint, that *he is indebted*, with a statement of the items of moneys received by him, is an allegation that all that is essential to *make him indebted* has been done; and consequently that a demand has been made.

In such a case, the summons is a sufficient demand; and the averment of demand is sufficient, on demurrer.

APPEAL, by the defendant, from a judgment of the special term, overruling his demurrer to the complaint.

A. A. Thompson, for the appellant.

J. E. Burrill, for the plaintiffs.

By the Court, MITCHELL, P. J. The complaint shows that the defendant was the treasurer of the plaintiffs, and for a hire agreed faithfully to perform every act appertaining to the office. It further shows that he was such treasurer and bound to perform the duties of the office from 10th January, 1855, to 17th March, 1856. And having thus stated matters of fact, it proceeds further, in the same style, to set forth another *fact*, and says, "the plaintiffs further show that the defendant is *indebted* to them in the sum of $5886.74 for *money received* by the defendant while acting as such treasurer; and that the items in their account are as follows;" giving the amounts received on each week day from the 11th to the 21st day of January, 1856, inclusive; and then demands judgment. The demurrer of the defendant was overruled at special term, and he appeals; arguing that a treasurer is not liable until a demand is made on him, and that none is alleged.

The duty of a treasurer is to keep the moneys of his principal distinct from his own. (unless a special agreement be made otherwise,) and to be ready at all times to pay over

what balance he owes to his principal, and to pay the balance on demand. If he cannot be indebted until a demand be made of him, the allegation, as a matter of fact, that he is indebted, with a statement of the items of moneys received by him, is an allegation that all that is essential to make him indebted has been done; and consequently that a demand has been made. In such a case the summons is a sufficient demand; and if none were made, the defendant should pay the debt, but not the costs. It may not be as definite as is proper, but it is sufficient on demurrer.

The judgment in favor of the plaintiff should be affirmed, with costs.

[New York General Term, June 6, 1857. *Mitchell, Roosevelt* and *Peabody*, Justices.]

COWLES, receiver of the Eighth Avenue Bank, *vs.* GRIDLEY.

A promissory note, given in payment of a subscription to the capital stock of a banking association, and discounted by the bank, for the maker, is upon a good consideration, and may be enforced by the receiver of the bank after its failure; notwithstanding that by an arrangement among the directors, of whom the maker was one, the instrument in question, and others of a similar tenor given by the others, were not to be considered as valid promissory notes, in the hands of any person, or for any purpose whatever, unless the directors should elect to pay their notes and take certificates of the stock.

And a renewal of such a note, at maturity, by the maker, on the assurance of the cashier that the interest paid "will come back to him on the making of a dividend to the stockholders," amounts to a determination of the maker's election to take the stock and to become absolutely bound for the amount.

THIS was an action upon a promissory note for $3650, made by the defendant, dated the 1st day of July, 1854, payable, with interest, to the defendant's own order, at the Eighth Avenue Bank, six months from date, and indorsed by him, belonging to the assets of said bank, of which the plaintiff was receiver. The Eighth Avenue Bank was a banking association, organized under the laws of 1838, and the subsequent

acts amendatory thereof. The articles of association were filed and recorded on the 5th day of August, 1853, and were signed by the defendant and eleven other persons, as the original associates, who therein declared themselves to have subscribed and taken the number of shares affixed to their respective names. The whole capital stock was $100,000, divided into two thousand shares of $50 each. The whole amount so affixed was $100,000, or two thousand shares, being the whole nominal capital of the bank. The amount affixed to the name of the defendant was two hundred shares, or $10,000. The persons so signing the said original articles were the first directors of the bank, and were named and designated as such in the articles. Before the articles were executed or drawn up, the several directors had procured in separate books, carried for that purpose by each, informal subscriptions to the capital stock of the contemplated bank, from a large number of persons, in various and small amounts, but which, including their own, made up the full amount of said contemplated capital, to wit, $100,000. Each of the directors was a subscriber in said informal subscription lists, and each for the full amount which he then intended to take and pay for, in the final organization of the bank; and each amount so informally subscribed was much less than the number of shares affixed to his name in the articles of association. The amount so informally subscribed by the defendant, and which only was then intended to be taken and paid for by him, was twenty shares, or $1000. The said informal subscriptions having been filled, the directors, in consultation with each other, but without any formal meeting, resolution, vote or action of the board, as such, and with the view to expedition, and the saving of labor and expense in perfecting the organization of the bank, by rendering unnecessary the formal subscription to the articles, and acknowledgment of each of the said informal subscribers, decided to divide, take and subscribe *pro forma* the whole of said capital stock among themselves, to pay the amount by them severally intended to be taken on their own account, according to their said several previous informal subscriptions, and to

hold the balance to be conveyed to the several other subscribers, as they should severally, by the payment of their subscriptions, be entitled to the same. The said articles of association were signed, and the number of shares affixed to the several names of the said twelve directors, pursuant to this purpose, understanding and agreement, and no liability was understood or intended to be assumed by their several subscriptions to the articles of association beyond the amount of their said several previous informal subscriptions. The articles of association being signed and duly filed and recorded, the said directors paid in, in cash, about $44,000 towards the capital stock of the bank, being the full amount of their several intended formal subscriptions, the defendant paying the full amount of his said twenty shares so intended to be taken and held by him. The bank being thereupon organized, purchased and deposited with the bank department of the state, proper banking securities to the amount of $100,000, and received from the department circulating bills to the same amount. The bank commenced the banking business on the 23d day of December, 1853. On the 1st day of January, 1854, there had been paid in by the directors and others of the said informal subscribers, towards the capital stock of the bank, the sum of $52,600, and on that day there yet remained a balance of unpaid subscriptions, amounting to $43,800. No stock had ever been issued to any party for such unpaid balance, or any part of it. The said balance of stock, being 876 shares, was thereupon divided equally among the several directors, amounting to seventy-three shares to each, and they gave their several notes for the same, each for $3650, and interest, dated January 1st, 1854, payable six months from date, to the order of some other director, and indorsed by the payees interchangeably. This was done at the solicitation of the president of the bank, and under a representation that a report then required by statute to be made to the bank department of the state, should show that the capital stock had been fully taken and issued, and with that object in view, but with an understanding and agreement among the said directors, without any formal action of the

board as such, that the arrangement should be wholly formal, creating no liabilities and conferring no rights whatsoever, unless or until the said directors should elect to pay their said notes severally and take certificates of said stock to themselves, or bring in other persons who should pay for and take such stock in their several places. A certificate for seventy-three shares of the stock was filled up without date, and signed by the president and cashier, to and in the name of each director, but such certificates were not cut from the certificate book, nor delivered to the said several directors, nor were intended to be, nor were they deemed or intended to be the stock of the persons named therein, unless or until the said directors should elect to pay their said notes severally, and take certificates of such stock. The notes were delivered to the cashier and were formally discounted on the books of the bank, and the proceeds placed in said books to the credit of the several makers, who thereupon drew their several checks upon the bank, each for the same amount as said credit, and to balance the same, and being the same amount as the par value of seventy-three shares of said stock, no actual payment of money on said checks being made; and appropriate entries were then made in the stock ledger and transfer book, showing that each of said directors held such shares. The several directors did not vote upon the stock represented by the notes, or exercise any rights or ownership over the same; and it was the understanding of the said parties in the entire transaction, that by it no rights should be acquired by the nominal holders of the stock, and no rights should be acquired by the bank in the notes, unless or until the directors should elect to pay their notes, severally, and take certificates of stock. The whole was intended by the parties as a temporary arrangement, until the unpaid subscriptions should be collected, or the full capital stock be otherwise paid in. On the 1st day of July following, the several notes then falling due, were renewed for six months on interest, omitting the indorsers, in pursuance of a formal resolution passed by the board of directors, and entered in the minutes, but for the same purpose and with the same understanding between all the

parties as when said first notes were made as aforesaid, and in continuation of said purpose and understanding. The interest on said first notes was paid to the bank by the several makers. When the defendant Gridley paid such interest on his said first note, he at first objected, and only paid the same on being told by the cashier that it would come back to him on the making of a dividend to the stockholders. The note in suit in this action was the defendant's note, given on said last mentioned occasion, in renewal as aforesaid. The capital stock of the bank was never fully paid in, otherwise than as above stated, nor did the defendant at any time bring in other subscribers to take said shares and pay for the same, nor did he do any other act indicating his election to take and pay for the same, further or otherwise than as above stated. The bank made its first default in payment on the 6th day of October, 1854, and became insolvent. The plaintiff was duly appointed receiver, on the 27th day of March, 1856.

Judgment was rendered for the plaintiff, at the circuit, for the amount of the note and interest; and a case was made with liberty to either party to turn the same into a bill of exceptions. The defendant appealed.

James Gridley, for the appellant. I. The note in question was not a valid note, as between the original parties, or in the hands of the Eighth Avenue Bank. (1.) Because between them it was expressly intended not to be. (2.) Because it was utterly and designedly *without consideration*. (3.) Because, if adjudged otherwise, the consideration was the payment of a *stock subscription*; the transaction was unlawful, and the note is void by statute. (1 *R. S. 4th ed. p.* 1113 [589.] § 1, *sub.* 3. *See also, Gillett, receiver*, v. *Philips*, 3 *Kern.* 119.) That there was no intent by either party to make or receive the note as a valid obligation, admits of no doubt. In every stage of the transaction, from the original subscription to the making, discounting and renewal of the note, it was accompanied by the reiterated protest of both parties, that the whole transaction was *formal* merely, and not intended to create, and should not

create any liabilities, or confer any rights upon either party, without their further action. The case puts this as a distinct finding of fact.

II. That there was, therefore, *no consideration*, follows of course, as a logical result. But not more as a logical result than as a matter of independent fact. The filling up of the stock certificate, and signing it, did not make the stock the property of the defendant, or give him any interest in it. Even a *delivery* would not necessarily have had that effect, for fraud, accident or mistake would have avoided a delivery. But here there was not only *not a delivery*, but a distinct declaration that there "was not intended to be a delivery, *nor was the stock deemed or intended to be the property of the defendant*, unless he should elect to pay his note and take a certificate." The whole thing rested in the future "election" of the defendant, and until that was made, conferred no rights upon either party. (*Goddard* v. *Cutts*, 2 *Fairf.* 440, 442.)

There was no law requiring the capital stock to be paid in, or that any "report" should so state. (1 *R. S.* 4*th ed. p.* 1140, §§ 139, 140, 144, 145, 156, 167, 177, 178, *sub.* 1, 3.) This is not a question of the contradiction of a written agreement by parol, but a question of fact as to the existence of the agreement at all. (3 *Cowen & Hill's Notes*, 1458. 3 *Hill*, 171. 14 *Wend.* 195. 24 *id.* 419.) No pretense can be made that the defendant has ever made an election to pay his note and take the stock. Nor can any importance be attached to the greater formality attending the *renewal* of the note, than in its original making, for the parties were always the same, and "the formal resolution [of renewal] passed by the board of directors, and entered in the minutes," was made "for the same purpose and with the same understanding between all the parties, as when said first notes were made as aforesaid, *and in continuance of said purpose and understanding*." It is clear that, *as between the parties*, the note is not valid, and the bank could not sue.

II. The rights of the receiver are not superior to those of the bank. A receiver, like an assignee, succeeds only to the rights of the insolvent, and takes, subject to all existing equities, de-

fenses and set-offs. And it is well settled that neither he, nor creditors under him, take as *bona fide* purchasers not even though the assets are negotiable promissory notes. (1 *R. S. 4th ed.* 1163, § 240. *Bur. on Assignments*, 438. 2 *Story's Eq. Jur.* § 1047, *n.* 6. 2 *Kent's Com. n. c.* 11 *Paige*, 21. 2 *id.* 567. 1 *id.* 125. 2 *John. Ch.* 441. 3 *Comst.* 479. *Id.* 19. *Hyde, receiver*, v. *Lynde*, 4 *Comst.* 387. 4 *Sand. S. C. Rep.* 604. 16 *Barb.* 294, 302. 2 *id.* 258, 478. *Mech. Bank* v. *N. York and N. Haven R. R. Co.*, 3 *Kern.* 599. 2 *Wash. R.* 233, 254. 11 *Alab. R.* 880.) It is conceded that the receiver represents the stockholders and creditors, as well as the bank. This will enable him to see that no unlawful disposition of the assets of the bank is made by the directors or trustees, and if attempted, to set it aside. Such were the cases of *Gillet, receiver St. Lawrence Co. Bank*, v. *Moody*, (3 *Comst.* 479;) *Same* v. *Phillips*, (4 *id.* 114;) *Leavitt, receiver*, v. *Palmer*, (3 *id.* 19;) *Brouwer* v. *Hill*, (1 *Sandf. S. C. R.* 629,) and some others. All these cases go upon the ground that the assets being in fact the valid assets of the company, the act of the directors or trustees, in disposing of them, was unlawful, and the disposition void; so that the assets remain still the property of the company, and as such passed into the hands of the receiver. The cases, therefore, do not conflict with the general statement above. But when the bank has no rights, the appointment of a receiver will not invest it with any. (*Hyde, receiver*, v. *Lynde*, 4 *Comst.* 387, *and the other cases supra.*)

III. Nor can this defence be resisted upon any general principle of an *estoppel*. Creditors are in privity with the *bank*, not with the defendant. To work an *estoppel in pais*, there must be an immediate and designed connection between the act or admission of the defendant, and the party affected by it. It can never be set up in favor of a stranger, but only between privies. It is never to be presumed, but is always to be specially proved. (*Mech. Bank* v. *N. Y. and N. Haven R. R. Co.* 3 *Kern.* 599. 3 *John. Cases*, 101. *Dezell* v. *Odell*, 3 *Hill*, 215. *Reynolds* v. *Loundsbury*, 6 *id.* 534. *Pennell* v. *Hinman*, 7 *Barb.* 644. *Heane* v. *Rogers*, 9 *B. & C.* 577

Davis v. *Field*, 4 *Met.* 381. *Truscott* v. *Davis*, 4 *Barb.* 495 8 *Wend.* 480.)

C. H. Hunt, for the plaintiff. I. The subscription to the capital stock of the bank, by the defendant and other original associates, acknowledged and recorded in pursuance of the statute, was a contract by which each bound himself to all who might become creditors or stockholders, to receive and pay for the number of shares affixed to his name. The private understanding among these associates, that such contract should be no contract, cannot discharge the obligations aforesaid; nor would such private understanding be admissible in evidence if objected to on the trial.

II. The giving of the note in question by the defendant was but a continuation of his promise to pay for 73 out of the 200 shares, which he had before undertaken to pay for by the subscription.

III. The defendant, as a director, held the relation of trustee to the bank. He could not, therefore, discharge his obligation to the bank by his own illegal act. Although he was forbidden by law to give his note in payment for the stock, it does not follow that he can repudiate the note. (*City Bank* v. *Barnard*, 1 *Hall*, 70.)

IV. There was plenty of consideration for the note, to wit, 73 shares of stock, at $50 a share. It was not necessary that the speculation should prove profitable, in order to constitute a consideration. If the shares could now be sold at a premium, the defendant would soon discover a good and valuable consideration for this note. His readiness in such a direction is shown by the case, where it appears that he consented to pay interest on the note of which the present is a renewal, on being assured that it would come back to him in the form of a dividend upon the stock.

By the Court, ROOSEVELT, J. The making and indorsement of the note sued on are admitted; but it is said that no value was received; that by an arrangement among the directors of the bank, of whom the defendant was one, the instrument was

never intended to be considered as a "valid promissory note." "in the hands of any person, or for any purpose whatever." On this statement of the defense, an inquiry naturally arises, for what purpose was the note given if, in every event, the promise or obligation was to be of no validity?

The case shows that the defendant was one of the original twelve subscribers to the Eighth Avenue Bank; of which the capital was $100,000, and his proportion, as expressed in the articles of association, $10,000. He, too, with his eleven associates, were the first directors. As soon as $44,000 was paid up, the bank organized and commenced business. Their purchase of securities, to deposit with the banking department, to the amount of $100,000, must, to a great extent, therefore, have been directly or indirectly on credit—and of course, on the credit of supposed bona fide paid up or secured capital. Instead, however, of paying up, the original associates and directors gave their notes for the deficiency, each for $3650, dated January 1, 1854, payable in 6 months, with interest, to some other director, and "interchangeably indorsed by the payees." At the same time also a certificate of the corresponding number of shares of stock was filled up and signed by the president and cashier in favor of each director, although not actually cut out from the certificate book. The notes were not only delivered to the cashier, but formally discounted on the books of the bank, and the proceeds carried to the respective credit of the makers; who thereupon drew their checks which were received as cash in payment of the stock and carried into the stock ledger and transfer book, "showing that each of the directors held such shares." When these notes fell due, which was of course 6 months afterwards, they were renewed for another 6 months, by the directors, as a board, for themselves individually, "omitting the indorsers," but paying the six months' interest. In three months the bank exploded, a receiver was appointed, and suits were brought by him, of which the present is one, on the several notes so given. And the defense now is, not as against other stockholders merely, but as against bona fide creditors, (for the receiver represents both) that, by an under-

standing among the directors themselves, all this was to be mere form—more properly speaking mere sham—"that no rights should be acquired by the bank, in the notes, unless the directors should elect to pay their notes and take certificates of the stock;" and that the stock having become worthless, probably by the very acts of the directors themselves, they have a right to reject, or rather to return it, and with it to repudiate the written engagements of which it is said to have formed the consideration. Can such a defense either in law or morals, be listened to? Can a director, in other words, be permitted to say that he agreed with a board of trustees, (himself being one,) that if there should be a gain on the stock he and his colleagues should receive it, and if a loss, the creditors and general stockholders should bear it? It will be said, perhaps, that such was not the agreement. In words it was not; but what, I would ask, was the distinction, in substance? The whole board gave to each of its component members the right of "election" for 6 months, and then again for 6 months more, to take or not to take the stock and to pay or not to pay the notes. What moneyed man, with such an option, would choose a loss or refuse a gain? To illustrate the position more strongly, take the case of two guardians of the estate of a minor. They agree each on his own account, with both as trustees, to speculate in cotton with the funds of their ward, giving notes for the respective amounts, after the fashion of the arrangement alleged to have been made in this instance, purporting on their face to be for value received, but with a verbal understanding that if the speculation turned out a bad one they were to be allowed to "elect" not to pay. Would it be any answer, in a suit by the substituted successor of these faithless guardians, to say that they had "elected" to nullify their written obligation? Whatever may be the force of these analogies, one thing is clear, that there was a consideration for the note which the defendant gave. It effected a compliance with the law and enabled the defendant and his eleven associates officially to report under oath that the whole amount of their "certified stock was paid in or invested," (§ 8 *of act of* 1840,) and to take the chance of a profit on their

snares without the risk of loss. But this is not all: the printed case states that when the defendant Gridley paid the interest on the original note, at its maturity, he did so on the assurance of the cashier, "that it would come back to him, on the making of a dividend to the stockholders." Here, then, when the second note was given, was a determination, by that very act, of the defendant's election to take the stock and to become absolutely bound for the amount. The directors, it is further contended, had no right to discount their own notes in payment of their subscriptions. The answer is, that the provision referred to (1 *R. S.* 589) had no reference to the free banks, which were expressly authorized to commence business on securities instead of cash, and, unlike the old chartered institutions, were required before issuing or even obtaining any circulation, to protect the involuntary holders of their bills by a proper deposit with the bank department of the state, of public stocks or private mortgages. And even if the taking of the note had been prohibited, would it be a legitimate satisfaction to the law to deny a recovery upon it, and thus instead of punishing, to *reward* the wrongdoer, and that at the expense of the innocent and injured creditor? The true principle on this subject, is expressed in that section of the statute of moneyed "corporations," which, while prohibiting discounts to directors, beyond a certain amount, very properly adds the proviso, that "no securities, taken for any such loan or discount shall be held invalid." (1 *R. S.* 590.)

Judgment for plaintiff affirmed with costs.

[New York General Term, June 6, 1857. *Mitchell*, *Davies* and *Roosevelt* Justices.]

MILLER *vs.* THE ILLINOIS CENTRAL RAIL ROAD COMPANY ROBERT and GEO. L. SCHUYLER and others.

On the 1st of October, 1851, R. & G. L. S. held, by assignment from L., the person named therein, a receipt or certificate in these words: "Office of Illinois Central R. R. Co., New York, May 1, 1851. Received of T. W. L. $7500 advanced to the Illinois Central Rail Road Company, and to be repaid to him or his order, with interest at the rate of six per cent per annum, on demand, or received in payment ten dollars on each share of the capital stock of said company, to be issued to him or his assigns, whenever the directors shall authorize the issue of the second million of the stock, under the provisions of a resolution of the board of directors, passed on the 17th day of April, 1851. M. K., Treas'r Ill. C. R. R. Co." This receipt was assigned to the plaintiff by R. & G. L. S., on the said 1st of October, by an indorsement thereon, "together with the right to take and receive to his own use and account 150 shares of the stock to be issued as set forth in the receipt," the assignors reserving the remainder of the stock for their own use and account. On the same day R. & G. L. S. made and delivered to the plaintiff their promissory note of that date, for $7000, payable in six months, with interest, which recited that the makers had deposited with the payee, with authority to collect, sell or assign the same, the receipt or certificate above mentioned. On the 3d of April, 1852, R. & G. L. S. executed and delivered to the plaintiff another note, of that date, for the same amount and of the same tenor as the first, reciting the delivery of the script for the same purpose, and with the same authority to the plaintiff to collect, sell or assign the same. They at the same time indorsed on the receipt or certificate, the following: "For value received, we hereby assign and transfer to W. S. M. the right to take a further 150 shares of the stock within mentioned, when the same is issued, making in all 300 shares which are to be delivered to him." On the 6th of October, 1852, R. & G. L. S. gave to the plaintiff another note for $7000, payable in ninety days, which recited that they had deposited the said certificate with the plaintiff as "collateral security," with authority to sell the same on the non-performance of said promise. The two latter notes were renewals or extensions of the loan of $7000 made at the date of the first, and at the time of the trial had been paid and were in the possession of the makers. The second million of stock was afterwards issued by the company, and the 750 shares were issued to R. S. on the receipt, and 300 shares were delivered to the plaintiff by him, and the certificate was surrendered to the company. On the 17th of November, 1852, the company resolved to issue 70,722 additional shares, and determined to whom they should be issued, and in what number to each person. No part of the new stock was allotted to the plaintiff, as owner of the 300 shares. If the 70,722 new shares had been distributed to the previous holders of stock in proportion to their shares, there would have fallen to the plaintiff, as holder of the 300 shares, 562 shares of the new. The plaintiff claimed that he was entitled to the 562 new shares at

an accretion upon the 300 old shares. He had no knowledge of the issue or allotment of the new stock, at the time, nor until after the receipt of his 300 shares, on the 23d of December 1852. R. S. was the president of the company, and controlled all its operations, and the plaintiff alleged that R. & G. L. S. intentionally kept him in ignorance of the allotment, and of his rights, and by that means, and their control over the company, secured to themselves the whole of the new stock allotted to the 300 shares so held by him, and caused the same to be issued to them, and claimed to hold it, which new stock was worth a premium of $35 per share.

Held, 1. That the original receipt of the treasurer gave to the person named therein, or the holders, only the right to take the 750 shares at their option, and the holders of that receipt could not, by virtue of it, claim to be holders of the stock mentioned in it, or to have any right thereto, until they had elected and given notice of their intention to take it. That the plaintiff, therefore, until he had done this, had no right to the stock, either as between him and his assignors, or as between him and the company.

2. That the rights of the plaintiff must depend upon the state of things existing at the time the new stock was created and issued; and that, not being at that time, the owner of the 300 shares of stock, and not becoming such owner by electing to take the same, until more than a month afterwards, he had none of the rights of a stockholder, in respect to the new issue of stock.

3. That the ownership of the 300 shares did not necessarily, nor so far as the evidence showed, entitle the holder to the 562 shares of new stock, and a distribution of the same to him.

4. That if, as between the plaintiff and R. & G. L. S. the former had been entitled to the 562 shares of new stock, the company, not having any notice of his rights, were not bound by them.

5. That although certain information came to R. S. the president of the rail road company, casually, while acting as agent of R. & G. L. S., that that firm had contracted conditionally to sell to the plaintiff some stock of the company, if given, without any intimation that it was intended or designed to give notice to him, or the company, or that he, as president, or the company as his principal, should take notice of it or regard it, or the rights or claims of the plaintiff, such information, thus received, did not bind the company as notice.

6. That the surrender of the receipt or certificate, to the company, with the indorsements thereon, made after the new stock was created, and the mode of its distribution resolved upon and carried out by the company, was no notice to the company of the plaintiff's rights. Roosevelt, J., dissented.

APPEAL by the defendants, from a judgment rendered at a special term. On the 1st day of October, 1851, the defendants Schuyler, composing the firm of R. & G. L. Schuyler,

held by assignment from T. W. Ludlow, the person therein named, a receipt or certificate, of which the following is a copy

"Office of Illinois Central R. R. Co.
New York, May 1, 1851.

Received of Thomas W. Ludlow, seven thousand five hundred dollars, advanced to the Illinois Central Rail Road Company, and to be repaid to him or his order, with interest at the rate of six per cent per annum, on demand, or received in payment ten dollars on each share of the capital stock of said company to be issued to him or his assigns whenever the directors shall authorize the issue of the second million of the stock, under the provisions of a resolution of the board of directors, passed on the 17th day of April, 1851.

(Signed) MORRIS KETCHUM,
Treas'r Ill. C. R. R. Co."

And on that 1st day of October the defendants Schuyler delivered the said receipt to the plaintiff herein, and executed to him, on the back of it, a transfer or contract of which the following is a copy:

"For value received, we hereby sell, assign and transfer the within receipt to W. S. Miller or his assigns, together with the right to take and receive, to his own use and account, one hundred and fifty shares of the stock to be issued as set forth in the receipt, reserving the remainder of the stock for our own use and account. Witness our hands, the 1st day of October, 1851. (Signed) R. & G. L. SCHUYLER."

And on the same day made and delivered to the plaintiff their promissory note of which the following is a copy:

"$7000 and in't. New York, October 1, 1851.

Six months after date, value received, we promise to pay to Wm. S. Miller, or order, seven thousand dollars (7000) with interest thereon, from this date, at the rate of seven per centum per annum, having deposited with him with authority to collect, sell or assign the same, the receipt of the treasurer of the Illinois Central Rail Road Company, hereto annexed, for seven thousand five hundred dollars and interest thereon, payable on

demand or receivable in payments of ten dollars on each share of the capital stock of said company to be issued to R. & G. L. Schuyler or their assigns, whenever the directors shall authorize the issue of the second million of said stock in pursuance of a resolution of the board of directors on the 17th day of April, 1851. R. & G. L. SCHUYLER,

2 Hanover street."

On the 3d day of April, following, the defendants Schuylers executed and delivered to the plaintiff another note of that date, for the same amount and of the same tenor as the first, reciting in the same terms the delivery of the same scrip for the same purpose, and with the same authority to the plaintiff to collect, sell or assign the same. And at the same time indorsed on the same receipt or certificate then in the hands of the plaintiff an additional indorsement, of which the following is a copy:

'For value received we hereby assign and transfer to W. S Miller the right to take a further one hundred and fifty shares of the stock within mentioned, when the same is issued, making in all three hundred shares, which are to be delivered to him. New York, April 3d, 1852. R. & G. L. SCHUYLER."

And on the 6th day of October, 1852, the defendants Schuylers gave to the plaintiff another note, of which the following is a copy:

"$7000. New York, October 6, 1852.

Ninety days after date, we promise to pay to W. S. Miller, or order, seven thousand dollars, for value received, with interest at the rate of seven per cent per annum, having deposited with him as *collateral security*, with authority to sell the same at the brokers' board or at public or private sale or otherwise, at his option, on the non-performance of this promise, receipt of Morris Ketchum, Tr. Illinois C. R R. Co. for $7500, being installment on Illinois C. R. R. stock, in name of T. W. Ludlow, indorsed to R. & G. L. Schuyler.

R. & G. L. SCHUYLER,

2 Hanover street."

The two latter notes were renewals or extensions of the loan of $7000 made at the date of the first, and at the time of the

trial had all been paid and were in the possession of the defendants Schuylers. The second million of stock referred to in the certificate or receipt of the treasurer, was afterwards issued by the company, and the 750 shares were issued to Robert Schuyler on the receipt, and 300 shares (either of those mentioned in the receipt, or others in lieu thereof,) were delivered to the plaintiff by Robert Schuyler, and the certificate itself with the indorsements thereon having been delivered to Robert Schuyler, by the plaintiff, was surrendered to the company by him, at the time he obtained the stock thereon from the company. The receipt was delivered to Schuyler on the 20th of December, and the 300 shares of stock were delivered by him to the plaintiff on the 22d of that month. On the 17th day of November, 1852, the company resolved to issue 70,722 additional shares, and also determined by the same resolution to whom they should be issued, and in what number to each person. If the 70,722 shares had been distributed to the previous holders of stock in proportion to their shares, there would have fallen to each share of the old stock, one and seven-eighths share of the new, and to the 300 shares transferred by Schuyler to the plaintiff, 562 shares of the new. This resolution to create the new shares and to allot or distribute them, as therein stated, was passed the 17th of November, 1852. No part of the new stock was allotted to the plaintiff as owner of the 300 shares. The stock, old and new, was worth a premium of about 35 per cent at the time, but previous to the time of the commencement of this suit it fell to about 20 per cent above par. The plaintiff had no knowledge of the issue or allotment of the new stock, at the time, nor until after the receipt of his 300 shares from Schuyler, on the 23d of December, 1852. He alleged, in his complaint, that Robert Schuyler, by means of the possession of the scrip, so obtained from him, and acting as president of the rail road company, under color of the resolution of November 17, 1852, on or about the said 23d of December, 1852, procured the said 562 additional shares of stock to be issued to him and G. L. Schuyler, in their own names, or to some other person or persons for their benefi.

and that the said R. and G. L. Schuyler claim to hold the same on their own account. The plaintiff claimed that he was entitled to the 562 shares which properly went to the 300 shares as an accretion upon them; that the company had notice of his rights, by the assignment of the receipt to him, indorsed on said scrip; and that Robert Schuyler being throughout these transactions, president of the company, it was bound, by notice through him, of the rights of the plaintiff, and is bound now to give him the shares, on his paying the installments due on them, or to pay him the amount of their value above such installments, or above par.

The judge, at special term, decided and decreed that the plaintiff was entitled, under the assignment to him, to 300 shares of the capital stock of the rail road company described in the pleadings as the 2d million of stock, and was entitled to 562 shares of the new stock, which were on the 23d of December, 1852, issued and delivered by the rail road company to the defendants, the Schuylers, without the consent or knowledge of the plaintiff and with full notice of his rights. And that the plaintiff was entitled to the premium upon such new stock, which, at the time the same was issued to the defendants, the Schuylers, was $35 on each share; amounting in the aggregate, to the sum of $19,670; together with interest. Judgment was therefore given in favor of the plaintiff for $23,173.44, besides costs.

J. Coit, for the plaintiff. I. The special endorsement on the scrip set forth in the complaint, and admitted in the answers, was an absolute assignment of 300 shares therein mentioned. (1.) The language is clear that the assignment of the 300 shares was absolute, and not a hypothecation as collateral security for a loan. (2.) The admission on the face of the assignment, that it was for value received, is *prima facie* evidence of a valid consideration, and there is no evidence to disprove it. (1 *Phil. on Ev.* 108.) (3.) The answer admits (fol. 49, 51) that the plaintiff was entitled to receive the 300 shares absolutely. (4.) The *amount* of the consideration, or "value

received is immaterial. The stock in question had no salable value at the time, and if any presumption is to be made, it must be that it was a favor to Schuyler, to divide with him the responsibility which Ludlow refused to assume. (5.) By accepting the assignment, Miller was substituted *pro tanto* to Schuylers' liabilities as well as rights. (*Ang. & Ames on Corp.* § 534. *Mann* v. *Currie*, 2 *Barb. S. C. R.* 294. *Rensselaer and Washington Plank Road Co.* v. *Wetsel*, 21 *id.* 64.)

II. The transaction was not usurious. (1.) There is no allegation of usury in the answer, nor any proof of it offered. (2.) There is no evidence offered that the transfer of the stock had any connection with the loan to Schuyler on the same day. (3.) The suggestion of usury, made on the argument, not alluded to in the answer, nor supported by affirmative proof, cannot affect the admission that the assignment was for value received. (*Gould* v. *Homer*, 12 *Wend.* 601. *Fay* v. *Grimsteed*, 10 *Barb.* 329. *Catlin* v. *Gunter*, 1 *Duer*, 253. *Archibald* v. *Thomas*, 3 *Cowen*, 284.)

III. The stock in the assignment mentioned was a part of the second issue, (called the second million,) and the assignment by Schuyler carried with it, as a necessary incident, a proportionate interest in the increased value of the stock, whether represented by a premium on the existing stock, or by new stock issued as a bonus to the stockholders. (1.) The "shares of stock" represented an aliquot part of the whole property and franchises of the company; when the shares were 20,000 in number, each share represented 1-20,000th of the whole property; if, then, the shares were doubled in number, two of the new shares repesented the same value as one of the old. (2.) The directors could not appropriate these shares for the partial benefit of some of the stockholders, to the exclusion of others, without manifest injustice. It is accordingly held, in *Angell & Ames on Corporations*, § 554; *Gray* v. *Portland Bank*, (3 *Mass. Rep.* 364;) *Palmer* v. *Lawrence*, (3 *Sand. S. C. R.* 162;) that all the advantages from the creation of the new stock belong equally to the existing shareholders. (3.) The certificates or scrip in question, giving the holder the right

of a certain number of shares when issued, stand in this respect, on the same footing as the shares themselves, and entitle the holder to a like proportion of the increased issue. (*Gray* v. *Portland Bank*, 3 *Mass.* 364.)

IV. It is admitted by the pleadings that Miller had no notice of the resolution of September 17th, for the issuing of the 90,722 shares of stock at the time of the alleged settlement in December, 1853. It is clear, therefore, that between Miller and the Schuylers, Miller was entitled to the 562 shares in question.

V. The Illinois Central Rail Road Company are liable to make good the premium on the value of the stock, at the time the plaintiff was entitled to receive it, which their answer admits to be $35 a share. They had no right to issue the whole additional stock to Schuyler. Their own resolutions showed how much belonged to the Ludlow scrip, and required the shares to be issued to the owners of the scrip. The scrip, when produced to them, showed on the face of it Miller's title to the two-fifths, as clearly as the title of Schuyler to the residue. They are therefore liable in damages for the same amount claimed against the Schuylers. (*Kortright* v. *Buffalo Bank*, 20 *Wend.* 91. *Ang. & Ames on Corporations*, § 554, 565. *Wilson* v. *Little*, 2 *Comst.* 450.)

VI. The objection, that the interest in the certificate was not divisible, cannot be urged to justify a delivery to the wrong person. (1.) The company were under the same liability to divide the shares mentioned in the scrip as in the case of an ordinary certificate of full stock. (2.) The objection, at any rate, is obviated by the assignment in question, inasmuch as the *whole interest* in the scrip is assigned, including option, the right of surrender, &c., with a trust implied to take out 450 shares in the name and for the use of Schuyler.

VII. This assignment to Miller, on the face of the scrip, could only be divested by a re-assignment or a cancelment by Miller, and this the company were bound to see to, at their peril. The indorsement on the certificate of a settlement with William S. Miller, *signed by Schuyler*, was no substitute

for such re-transfer. The document was still evidence that Miller was the party entitled to the stock. The document calling for stock to be issued *to Miller*, the delivery of this document by Miller to an officer of the company, was no authority to issue the stock *to such officer in his own* name.

VIII. The injunction was issued against the company's suffering the specific stock in question, (belonging to the Ludlow scrip) to be transferred, if in possession of the company. It appears by the pleadings, that this stock had been actually issued, and there is no proof to the contrary. There is nothing therefore in the issuing the injunction to prevent the plaintiff receiving the relief prayed—that is, the amount of the premium on the 562 shares, viz. $35 a share.

Daniel Lord, for the Illinois Central Rail Road Company. I. The various transfers on the receipt, and the several notes of the same dates, respectively, were cotemporaneous papers, in reference to the same subject, and are to be taken together as forming one agreement. (*Cornell* v. *Todd*, 2 *Denio*, 130. *Palmer* v. *Gurnsey*, 7 *Wend.* 248. *Cooper* v. *Whitney*, 3 *Hill*, 99. *Cowen & Hill's Notes to Phil. Ev.* 958.) And being held to contain the whole agreement, they exhibit the whole consideration. (*Aldridge* v. *Birney*, 7 *Monroe*, 344.) And, there being no evidence and no allegation of any other consideration, it was erroneous to construe or imply any other consideration.

II. The transfers and notes together formed a mere mortgage of the receipt. And the concession of the right to take stock, and the transfer of the receipt, were alike redeemable interests; and no absolute title, in respect of either, passed to the plaintiff. (*Coote on Mortgages*, *ch.* 3, *last Am. ed.* 1 *Powell on Mortgages*, (*Rand's ed.*) 116, *a.* *Palmer* v. *Gurnsey*, 7 *Wend.* 248. *Cooper* v. *Whitney*, 3 *Hill*, 100.) This is an inflexible rule of policy, to protect the mortgaging debtor, and is not one of construction; it prevails even against the direct agreement of the parties. (7 *Wend.* 250.) Evidence of contrary intent was excluded. (*Colvill* v. *Woods*, 3 *Watts*, 188. *Jennings* v. *Ward*, 2 *Vern.* 520.) And it obtains equally

where an additional bargain or further consideration is connected with the mortgage. (*Willett* v. *Wennell*, 1 *Vern.* 488.) The fact that, on the redemption, Schuyler allowed 300 shares to Miller, without redeeming, does not affect the legal rule applicable to the mortgage. And if Schuyler's acts are to govern, they show only an intent to give the right to take 300 shares.

III. By a true construction of the papers, the plaintiff was not entitled to any other shares than what were issued on the resolve contained in the receipt. By the charter, the increase of stock was to be under the discretion of the board of directors. (*Walker* v. *Devereaux*, 4 *Paige*, 251. *Clarke* v. *Brooklyn Bank*, 1 *Edw. Ch. R.* 362. *Haight* v. *Day*, 1 *John. Ch. Rep.* 20. *Meads* v. *Walker*, 1 *Hopkins*, 590.) No other stock was allotted on the receipt in question, than 750 shares.

IV. The expressions in the transfers of the receipt only gave an option to subscribe to a certain extent. To obtain the benefit of it, a party must give notice, not only of the existence of the privilege, but of his option to exercise it. This never was done by the plaintiff.

V. The company are not chargeable with notice, from the fact that Robert Schuyler, who dealt with the plaintiff, was president of the defendants. In such dealing he was not acting as an officer of the company. It does not appear that, from the office of president, Schuyler had any thing to do with receiving notices of transfers. There is no evidence that any notice of the claim or intent to subscribe for more stock than 200 shares was ever given even to Schuyler. (*Ang. & Ames on Corporations, ch.* 9, § 5. *National Bank* v. *Norton*, 1 *Hill*, 578. *Commercial Bank* v. *Cunningham*, 24 *Pick.* 276. *Fulton Bank* v. *N. Y. and Sharon Canal Co.* 4 *Paige*, 136.)

VI. The receipt itself, when returned to the company, was not notice of any rights in the plaintiff. The face of the paper showed the whole settled between Schuylers and the plaintiff. The possession of the security which had been pledged, with cancellation on it, was presumptive evidence that its obligation had been terminated. (1 *Greenl. Ev.* § 38. 2 *id.* § 527.

Owen v. *Barrow*, 4 *Bos. & P.* 101.) The company had no right to suppose the cancellation of the transfer was falsely made, as it would have been a forgery—not to be presumed, in the absence of all evidence. That it would have been a forgery, see 2 *R. S.* 673, § 33, *sub.* 2.

VII. On the evidence in the case, Schuyler is shown to be authorized to receive the full performance of the defendants' contract and to settle it. The complaint alleges him to have been authorized as to the 300 shares, and no limitation of his agency appeared in the papers. The possession of the papers by the mortgagors, and the evidence that they had been mortgaged only, was evidence of Schuyler's right to the receipt and all its advantages. (2 *Greenl. Ev.* § 65. *Story's Agency*, § 104. *Whitlock* v. *Waltham*, 1 *Salk.* 157. *Owen* v. *Barrow*, 4 *Bos. & P.* 101. *Wolstenholme* v. *Davis*, 3 *Eq. Cas. Ab.* 709. *Dutchess of Cleveland* v. *Dashwood*, *id.* 708. *Anon.* 12 *Mod.* 564, *per Holt.*) The right, under the receipt, was on a contract not divisible without the assent of the company; and supposing Schuylers and the plaintiffs jointly interested in the receipt, the company were right in dealing with the Schuylers and leaving them to fulfill their sub-contract with the plaintiff

VIII. The damages awarded are not warranted by the case. The earliest demand of the stock by the plaintiff, was October 31st, 1853; the value then was $20 per share premium: the rate allowed is $35 per share, the value on 22d December, 1852. And the plaintiff claimed the shares specifically, and enjoined them in the company's hands. They cannot claim damages as upon a wrong issue, and also claim the stock as not issued. It is impossible to ascertain on what basis the judge awarded damages for 562 shares, giving the plaintiff 862 shares on the receipt.

IX. The defendants having proved their defense affirmatively, the judgment should be reversed, with costs, and judgment given for the defendants.

Alex. Hamilton, for the defendants R. & G. L. Schuyler. I. The true construction of the assignment only required the delivery of 300 shares.

II. The answer alleges, and the testimony in the case establishes, that the assignment of the right to the 300 shares was part of the collateral security for the loan of $7000, and that no other consideration but the loan itself ever existed or passed between the parties, in regard to such 300 shares.

III. The loan of $7000 having been repaid in full, with interest at 7 per cent, the bonus or additional compensation of 300 shares delivered to the plaintiff, worth a premium of $10,500, was grossly usurious, but the defendants are content that the plaintiff should retain this large compensation.

IV. The "value received," spoken of in the assignment of the receipt for $7500, was evidently the loan itself, and it was the only and a good consideration in law for the assignment of the receipt as collateral security for the loan.

V. The plaintiff was bound to prove, affirmatively, the "valuable" consideration alleged by him for the transfer of the 300 shares. Any other consideration than the loan was denied by the defendants, R. & G. L. Schuyler.

VI. This is not the case of a party seeking to avoid the payment of a debt on the ground of illegal consideration; but one in which a very large bonus having already been received, contrary to law, a much larger amount is sought to be recovered in the same way. The court cannot close its eyes to the foundation upon which the claim rests.

VII. The instruments relied on by the plaintiff, of Oct. 1st, 1851, and April 3d, 1852, were not transfers of stock, but transfers of the scrip, for $7500, by way of pledge, with an option or privilege to take 150 and 150 shares of the stock. The plaintiff never gave to R. & G. L. Schuyler, notice of his intention to avail himself of this option.

VIII. The injunction having been served upon the defendants on the 21st of November, 1853, and not having been disturbed, the plaintiff can only recover the 562 specific shares of stock, and not the damages for the non-delivery.

IX. At all events, the plaintiff can only recover the difference between $35, the premium of the 23d of December, 1852, and $20, the premium at the time of the service of the injunction.

PEABODY, J. The paper signed by the treasurer of the Illinois Central R. R. Co. was a receipt of the company for $7500. It contained, also, an agreement that it should be repaid to Ludlow or his assigns, on demand, with interest at the rate of six per cent, or that it should be received in payment of $10 on each share of the stock to be issued to him when the directors should authorize the issue of the second million. The language, "to be repaid to him * * * * or received in payment ten dollars on each share * * * * to be issued to him," &c., expresses a contract on the part of the company to do one or the other of those things. As an acknowledgment of the receipt of the money, it is explicit and its meaning unquestionable, and the subsequent part of it contains an agreement either to repay it on demand or accept it as a payment of $10 on a share on account of the stock to be issued. This part is in the alternative, to do one or the other. The paper does not show very clearly which party might elect between the alternatives, but the course of the business shows that it was the intention that Ludlow should elect which course should be taken, and this would probably be the meaning of the paper itself, considered separately from other evidence. The company then had $7500 of the money of Ludlow, which was to be repaid to him on demand, in money or by issuing to him stock of the second million, not then issued, but to be issued to *him* whenever the directors should authorize the issue of that million. They had resolved (April 17, 1851) to issue it, and they agreed to issue to him the number of shares on which this sum would pay $10 per share. $7500 would pay $10 a share on 750 shares. It was then a contract either to repay him the money or issue to him 750 shares of their stock on which this sum, $7500 or $10 a share, was to be credited as paid, and the company was to do the one or the other at the

election of Ludlow or his assigns. It gave Ludlow or his assigns, then, the right, at his or their option, to receive from the company the money or the stock to the amount of it—750 shares. On the 1st of October, following, the Schuylers, being owners of this receipt and contract, indorsed on it, bearing date on that day, an assignment by which they transferred it to the plaintiff. By the transfer indorsed, they "sell, assign and transfer" to him or his assigns the receipt, "together with the right to take and receive to his own use and account 150 shares of the stock to be issued as set forth in the receipt, reserving the remainder of the stock for our (their) own use and account." This transfer is not very clear and intelligible by itself. Being in its terms an absolute sale and transfer of the whole receipt, the part which purports to authorize him to receive to his own use 150 shares, seems to be supererogatory. The paper called the receipt, gave to the holder the right to take the whole 750 shares of the stock, and the assignment of that to the plaintiff gave him apparently the right to take the whole of that amount. To follow the general transfer of that right with the words "together with the right to take to his own use and account 150 shares of the stock," seems unmeaning. But this grant of authority to take to his own use the 150 shares is followed by an express reservation of the rest of the stock (the 750 shares) therein mentioned, to the use of the grantors, in the following words: "reserving the remainder of the stock to our own use and account." This assignment then commences with an absolute transfer to the plaintiff of the right to take the whole 750 shares, and then proceeds in terms indicating an intention to increase his rights, to give him the further right to receive to his own use 150 shares of the stock, and closes with a reservation to the assignors, of the remainder (after deducting the 150 shares,) to their own use. The second part of this paper—that giving the right to take the 150 of the 750 shares—seems utterly unmeaning and ineffectual; the right to take the whole 750 (including, of course, this 150 with the rest) having been given in the preceding lines; and the concluding part of the paper containing the reservation of all except the 150

shares, for the use of the assignors, seems absolutely inconsistent with the first part, which gives the right to take the whole 750 shares. These last provisions seem entirely consistent with each other; but whether taken separately or together, they are both inconsistent with the first. To grant the right to 150 of 750 shares, and reserve the right to the rest of the 750, is consistent and intelligible; but to grant the right to 750 shares, and add to that a grant of 150 out of that 750, is not consistent; and to follow that with an express reservation of all except the 150, though quite consistent with the grant of the smaller number, is contradictory to the grant of the larger number, and cannot consist with it. To construe this paper in such a manner as to give effect to all its parts, is precisely our duty, if it be in our power; but to do so it is pretty certain, I think, that we must have aid from other evidence than that contained in the paper itself. There is evidence in the case, that on the same day on which this assignment was made by the defendants Schuylers, they gave to the plaintiff their promissory note for $7000, payable in six months, in which it is stated that they had deposited with him, with authority to collect, sell or assign the same, the receipt of the Treasurer of the Illinois Central Rail Road Company, for $7500, payable on demand or receivable in payments of ten dollars on each share of the stock of said company, to be issued to R. & G. L. Schuyler, or their assigns, whenever the directors should authorize the issue of the second million of said stock, in pursuance of a resolution of the board of directors, passed April 17, 1851. On the 3d day of April, 1852, this note was taken up and a new note at six months, for the same amount, containing the same statement of the deposit of the receipt of the treasurer as security, was given. This last note, at maturity, was taken up and succeeded by a new one in renewal for ninety days for the same amount, the interest on each of them being paid as they were taken up from time to time. The last note for ninety days also states that the Schuylers had deposited with the plaintiff the same receipt of the treasurer of the Illinois Central R. R. Co., and expressly says

it was so deposited "as collateral security." These notes, then, show the conditions and purpose of the general assignment of the receipt. They show that it was assigned as collateral security for the notes. The same assignment answered for the second and third notes, and no new transfer was made of the receipt, generally, for either of them; but at the same time with the making of the second note a new indorsement was made on the treasurer's receipt, as follows: "For value received, we hereby assign and transfer to W. S. Miller, the right to take a further 150 shares of the stock within mentioned, when the same is issued, making in all 300 shares which are to be delivered to him. Dated April 3, 1852."

In each of these notes, the fact that the plaintiff held the receipt as security is stated. The assignment of the rights of the Schuylers under the receipts was intended merely as collateral security for the payment of the money on the notes, and so far as that was concerned it was redeemable by payment of the money. Nothing is said in the notes about the other provisions in the paper called an assignment—that respecting the 150 shares, or that about reserving to the assignors, the Schuylers, the residue of the 750 shares. As to these parts, the paper must stand, and effect must be given to it, according to it own terms and meaning. Nothing in the case goes to modify these terms.

After the giving of the last note, and before it fell due, the company, by a resolution bearing date on the 17th day of November, 1852, created and distributed 70,722 new shares of the stock. This stock, the plaintiff says, was distributed among the stockholders as an increase or addition to the stock held by them, including the scrip, and in the proportion of one share and seven-eighths of the new stock for each share of the old; and he claims that he was entitled, as holder of the 300 shares, to 562 shares of this new stock as an accumulation of, and an addition to, his 300 shares.

To this claim several objections are interposed by the defendants: 1st. That the plaintiff, at the time of the creation of the new stock, was not the holder of the 300 shares; that he

merely had the right to elect to take them, but had not elected. 2d. That if he was owner of the 300 shares, he had no right, as such owner, to a distributive share in the new stock. And by the company it was insisted, 3d. That all his rights were matters between himself and the Schuylers, of which the company had no legal notice, and which they were not bound to regard.

As to the first objection, there is nothing in the case to show that the plaintiff, on the 17th day of November, 1852, had determined to take the 300 shares which the defendants Schuylers had given him the right to take. They gave him the right to take 150 shares, by an indorsement on the receipt, bearing date the 1st day of October, 1851, and the right to take 150 shares more, making 300 in all, by another indorsement thereon, bearing date the 3d day of April, 1852. These indorsements were in form assignments to the plaintiff of the right to take this number of shares of the stock. The original receipt of the treasurer gave the Schuylers, or the holder, only the right to take the 750 shares therein mentioned, at their option, and the holders of that could not, by virtue of it, claim to be holders of the stock mentioned therein, or to have any rights to it until they had elected and given notice of their intention to take it. The plaintiff, therefore, until he had done this, had no right to this stock, either as between him and the Schuylers, or as between him and the company.

The receipt gave the holder of it only this right as against the company; and the Schuylers merely gave the plaintiff the same rights they had as to 150 of the shares therein provided for. The plaintiff does not aver in his complaint, or prove, that he nad made his election, to take the shares or not, much less does he aver or prove that he had given notice of his election, either to the company or to the Schuylers, and he had no right as against either of them, to the stock, until he had both elected and given notice of his election. If he had exercised his right of election, and had notified the Schuylers, he would then have had a right to the stock, out of their 750 shares. If the company had been properly notified by him of his rights and of his

election to take, and that he should look to them to issue it to him, they would probably have been bound by that notice, and he would, as to both of them, probably have been entitled to the stock, and would thereby have acquired the rights of a stockholder as to any new issue of stock. The only averment of an election by him, in his complaint, occurs at fol. 17, and he there only avers that on the 20th day of December, 1852, he gave to Robert Schuyler the receipt of the treasurer, to enable him to receive for him (the plaintiff) such stock as the plaintiff might be entitled to from the company, and that said Schuyler did deliver to him the 300 shares, on the 23d of that month. There is no claim or evidence of an election or notice by the plaintiff until this time. This, I suppose, may be considered an election, and notice of it to the Schuylers, at least; and from this time forth, as between the plaintiff and the Schuylers, he was entitled to, and had, the rights of owner of this stock. But the 70,722 shares had been created, and partially or wholly distributed before this time. The rights of the plaintiff must depend on the condition of things at the time the stock, of which he claims a distributive share, was created and issued. At that time he was not owner of this 300 shares or any part of it. More than a month after that he became, by his own account, the owner of it, to be sure; but he could not retroactively acquire any right to it, and he did not. The title to it had already vested in some one else, perhaps, and whether it had or not, he had no right to it. His purchase of the 300 shares was made, in effect, in December following—more than a month thereafter.

The second point is, that even if he were holder of the 300 shares, he was not entitled for that reason to the distributive share of the new stock. The ownership of stock of the company gave to the owner an undivided interest as owner, in the property of the corporation—an interest which bore the same proportion to the whole property, as his shares did to the whole number of shares. This right was a right or proportionate interest in the assets of the company, and in the proceeds and benefits of the property of the company. These assets

were the property of the corporation. This was a right not to any part of the assets, separately and exclusively—not a right to an immediate, exclusive possession of, or property in, any particular part of those assets; not a right to an immedi ate distributive share of the assets or any part of them—and no more a right to a distributive share of any stock of the corporation belonging to itself, than to any other property belonging to it. Prima facie all the property of the corporation was dedicated to its use for the purpose of advancing the enterprise for which it was organized; and any stock it might own, whether of its own capital or that of any other company, like any other property, was to be used in the discretion of its officers to accomplish that end in the manner most beneficial to the corporation, and corporators as such. As to the 70,722 shares of stock they resolved to create, that, as soon as created, belonged to the company, and like other property was to be used for its benefit and advancement in the business to which its energies were to be applied. In the hands of its directors and agents the $35 per share which that was worth was properly applicable, like its other funds and means, immediately to the advancement of the interests of the corporation, and in this manner to the benefit of its corporators or stockholders. To divide this at once among the stockholders, in proportion to their interests respectively, would have been to withdraw from the treasury of the company the sum which it was worth, and diminish to that extent its means; a measure which might or might not be for the best interests of the company, and its members, and which as it might or might not seem so to its directors and agents, it became their duty to adopt or reject, but it was one which at any rate neither the plaintiff nor any stockholder could demand as his right. It is not shown that such a distribution was made among the stockholders generally, and I think there is some evidence that it was not, but in the absence of evidence on the subject, the view most favorable to the plaintiff, we cannot assume that it was but are bound tc suppose that this fund was administered like other assets of the company in the manner deemed on the whole most bene

ficial. Whatever disposition was made of it, the stockholders get the benefit of it directly or indirectly.

The only question remaining to be examined, is that of notice; and this relates only to the liability of the company. The plaintiff says that it had notice. 1st. Through Robert Schuyler, with whom as a member of the firm of R. & G. L. Schuyler, the plaintiff dealt as to the stock. 2d. That it had notice by the production to it of the treasurer's receipt with the indorsement thereon, at the time the stock was issued upon it and it was surendered.

The notice claimed through Robert Schuyler is claimed on the ground that he being president of the company, it is bound by any information he had. But it must be borne in mind that he had no intercourse on this subject with the plaintiff as president of the company. The plaintiff had no intercourse with the company on this subject, either through Schuyler or otherwise. He had no dealing with Robert Schuyler, for himself, even. He dealt with the firm of R. & G. L. Schuyler, and his dealings with this firm were through the medium of Robert, who, as a member of that firm, had the power of an agent to bind it by his acts, in its name and on its behalf. But notice to R. & G. L Schuyler, was not notice to the company. Neither is notice to Robert notice to the company, in a matter in which he represents, not the company, but R. & G. L. Schuyler. In this matter, Robert did not represent the company at any time. Notice to an agent, in a transaction for which he is employed, is notice to his principal, and it is *only* in such a case that the principal (whether a corporation or a natural person) is bound by notice to his agent. No notice, as such, was in point of fact given to him in any character, as president or agent of the company or otherwise. Certain information, it is true, came to him casually, while acting as agent of R. & G. L. Schuyler, that that firm had contracted conditionally to sell to the plaintiff some stock of this company, without an intimation, however, that it was intended or designed to give notice to him, or the company, or that he as president, or the company as his prin

cipal, should take notice of it or regard it, or the rights or claims of the plaintiff in relation to the subject of it. Such information, thus received, (if notice it can be called at all) does not bind the company as notice. (*Ang. & Ames on Corp.* §§ 305, 306, 307, 308. *National Bank* v. *Norton*, 1 *Hill*, 578. *Fulton Bank* v. *N. Y. and Sharon Canal Co.* 4 *Paige*, 136.)

The surrender of the certificate or receipt with the indorsements thereon, has still less the semblance of a notice. In the first place, the surrender was made after the 20th of December, and long after the new stock was created and the mode of its distribution resolved on and formally acted on by the company with certain parties, on terms which gave the transaction the nature of a contract between the company and the parties contracting to take. And in the second place, the paper was in possession of Robert when they first saw it, and it was surrendered by him as a member of the firm of R. & G. L. Schuyler, in whose hands the receipt, even with the indorsements thereon, was presumptively the property of the firm which he represented, and not of the plaintiff. Such a paper with the assignment indorsed, in the hands of the assignor, prima facie belongs to him and not to the person named as assignee in the assignment, thus apparently not completely executed by a delivery, or else surrendered to the assignor and in his power for the purpose of cancellation or other disposition.

The surrender by him to the company, was in itself a representation by him that he had the authority to surrender, and his mere possession of the assignment accompanied with this representation and act, was far from being evidence to the company that he did not own the certificate, or had parted with his right to it; so that, 1st. If, as between the Schuylers and the plaintiff, he had been entitled to the 562 shares, the company had no notice of his rights, and were not bound by them; and 2d. As between him and the Schuylers he was not at the time the new stock was created and his right to it is said to have accrued, the owner of the 300 shares upon the strength of his title to which he bases his claim; and 3d. The ownership of

these 300 shares did not necessarily, nor as far as the evidence shows, entitle the holder to the 562 shares and a distribution or delivery of them to him, whoever he may have been.

A new trial must be granted; costs to abide the event.

MITCHELL, P. J., concurred.

ROOSEVELT, J., dissented.

New trial granted.

[NEW YORK GENERAL TERM, June 6, 1857. *Mitchell*, *Roosevelt* and *Peabody*, Justices.]

VAN RENSSELAER *vs.* CHADWICK.

24 333
24 352
24 370
32 468
22a 332

The rent reserved in the manor leases which exist in this state, is a rent charge. The *dictum* to the contrary, in *Van Rensselaer* v. *Bradley*, (3 *Denio*, 135.) is not sustained by authority.

Where several persons, being the owners of land chargeable with rent, as tenants in common, make partition between themselves, each assuming the payment of his equitable share of the rent, a release to one of the owners does not extinguish the liability of the other.

Thus, where lands, charged with the payment of the rents reserved in the original leases, descended to the defendant and his brother J. C., from their father, the lessee, and they made partition between themselves, each conveying to the other, and each agreeing to assume and pay his equitable proportion of the rents; *Held* that the land of each was still liable for the rent, but that, as between themselves, each was liable to the other for any amount he was compelled to pay, beyond his proportionate share.

And the lessor having, subsequent to such partition, and apportionment of the rent, executed a release to J. C. of all his estate and interest in the portion of the premises conveyed to J. C. on the partition; it was *further held* that the lessor, by the execution of that release made himself a party to the partition, and became bound by the apportionment that had been made; and that he could no longer claim from the defendant the payment of any greater amount of rent than by the contract for partition between him and J. C. he had agreed to pay.

Also held that there was no rule of law which would give to such a transaction the effect of exonerating the defendant, or his land, from the payment of his proportionate share of the rent.

No case is to be found in which rent, though it be a rent charge, if in its nature it be divisible and apportionable, has been held to have been extinguished as to the tenant of one parcel of the land, by a release to another tenant of a different parcel held by him in severalty. *Per* HARRIS, J.

Where a lease reserved to the grantor &c., "yearly and every year, the yearly rent of twenty-eight skipples of wheat and four fat fowls, *and perform* one day's service with carriage and horses, the *first* payment to be made on the 1st day of January," &c.; *Held* that the fair construction of the whole sentence required that the words "yearly and every year," and the words "yearly rent," should be made applicable to the performance of the day's service as well as the other items of the rent.

THIS action was brought to recover certain rents alleged to be due from the defendant to the plaintiff. It was tried at the Albany circuit, in October, 1853, before Mr. Justice PARKER. Upon the trial, the plaintiff gave in evidence a lease in fee from Stephen Van Rensselaer, his father, to Samuel Combe, jr., dated February 23, 1797, for lot 74, in the town of Rensselaerville, containing 160½ acres, and reserving certain rents. Also, a similar lease to Andrew Speckerman, for lot 75, in the same town, dated February 10, 1803, the lot containing 153½ acres. The reservation of rent in the last mentioned lease was as follows: "Yielding and paying therefor, yearly and every year, during the continuance of this grant, unto the said Stephen Van Rensselaer, his heirs or assigns, the yearly rent of 28 skipples of good, clean, merchantable winter wheat, and four fat fowls, to be delivered at the now mansion house &c., and perform one day's service with carriage and horses."

It further appeared that Aaron Chadwick, the father of the defendant, in his lifetime, became the assignee of the lessee of lot 75, a part of lot 74 and also parts of three other lots, making together a farm of 315 acres; that he died in 1838, and his farm descended to the defendant and his brother John Chadwick, as heirs at law; that the two brothers made partition between themselves; that John Chadwick conveyed to the defendant 142 acres of lot 75 and 15 acres of lot 74, and the defendant conveyed to John the residue of the farm. These deeds bear date the 4th day of March, 1841. In each of the deeds it is stated, that the grantee is to hold "subject to the

claims of Stephen Van Rensselaer, Esq. proprietor of the soil." The rent had been paid up to the year 1838. The amount due upon that part of lot 76 conveyed to the defendant, from 1838 to 1853, with interest, was $480.48, and on that part of lot 74 conveyed to the defendant, $52.88. These sums included $25 charged for the day's service with carriage and horses.

The defendant also gave in evidence a deed from the plaintiff and his wife to John Chadwick, dated August 19, 1842, whereby for the consideration of $632, the plaintiff, who was admitted to be the devisee of the rents reserved upon the lots in question, released to John Chadwick, his heirs &c., all his estate, right, title, interest &c., in and to the farm conveyed to him by the defendant. The testimony being closed, the counsel for the defendant insisted that the rent in question was a rent charge, and that by releasing 20 acres of lot 75 from the payment of rent, as the plaintiff had done by his deed to John Chadwick, he had extinguished the rent upon the whole lot, and that consequently the plaintiff could not recover for any rent upon that part of lot 75 held by him, since 1842.

The counsel for the defendant also insisted that, inasmuch as it appeared that one day's service with carriage and horses had been paid, the plaintiff was not entitled to recover any thing on account of such services. The court refused so to hold, and decided that the plaintiff was entitled to recover the whole amount claimed as the proportionate share of rent chargeable upon those parts of the lots held by the defendant, amounting to $533.36. Upon this decision judgment was entered, and the defendant appealed to the general term.

C. M. Jenkins, for the plaintiff.

A. J. Colvin, for the defendant.

By the Court, HARRIS, J. There can be no doubt, I think, that the rent reserved in the manor leases which exist in this state, is a rent charge. The *dictum* to the contrary, in *Van Rensselaer* v. *Bradley*, (3 *Denio*, 135,) is not sustained by

authority. In *Coke Litt.* § 217, it is said that "if a man make a feoffment in fee, and by the same indenture reserveth to himself and his heirs a certain rent, with power of distress, such a rent is a rent charge, because such lands and tenements are charged with such distress by *force of the writing* only, and not of common right." The rent reserved upon a grant in fee is in the nature of a new purchase from the grantee. *Bacon's Abr. tit. Rent, H.*)

The doctrine of the common law in relation to the discharge of a rent charge, as it is laid down by Littleton, § 222, is that if a man has a rent charge issuing out of certain lands and he purchases any part of the land, the rent charge is extinct. The reason for this rule, as given by Lord Coke, is, that the rent is entire, and against common right, and issuing out of every part of the land, and therefore by purchase of part it is extinct in the whole. So also, if a person having a rent charge issuing out of three acres of land, releases all his right in one acre, the rent is extinct, because all issues out of every part, and it cannot be apportioned. (18 *Vin. Abr.* 505.)

The common mode, says *Cruise*, when a person entitled to a rent charge is disposed to exonerate a part of the lands from the payment of rent, without risking its entire extinguishment, has been for the grantee of the rent charged to join in the conveyance of the land, which operates as a release of the land conveyed, and to insert a proviso in the deed that the other lands shall continue subject to the rent. (*See* 3 *Cruise*, 318.)

It would still be necessary to adopt some such mode of proceeding where it was sought to exonerate a part of the land charged with the rent, and hold the residue for the payment of the whole. But it has never been supposed that, where tenants in common of lands chargeable with rent, have made partition between themselves, each assuming the payment of his proportionate share of rent, any such precaution was necessary. "If coparceners make partition," says Perkins, "the rent shall be taken by equity, so that in that case, the rent shall be apportioned." (*Perkins on Conveyancing*, § 677.) After such a partition, a discharge of one portion of the land from the rent could only

operate to the advantage of the other portion. It might happen, without such a discharge, that the land of one coparcener might be charged with the payment of all the rent; but, after such a discharge, it could only be charged with such proportion of the rent as the tenants themselves had agreed upon, as its just share.

In this case, the lands charged with the payment of the rents reserved in the original leases had descended to the defendant and his brother. They had made partition between themselves. Each had conveyed to the other, and each had taken his share subject to the claim of the plaintiff, by which I understand that it was agreed between them that each should assume and pay his equitable proportion of the rents reserved upon the lands of both. The land of either would still be liable for all the rent, but, as between themselves, each would be liable to the other for any amount he should be compelled to pay beyond his proper share A partition having thus been made, and the rent having been apportioned between the several owners of the land, the plaintiff, by the execution of the release to John Chadwick, made himself a party to the partition and became bound by the apportionment that had been made. He could no longer claim from the defendant the payment of any greater amount of rent than by the contract for partition between him and his brother he had agreed to pay. There can be no rule of law which will give to such a transaction the effect of exonerating the defendant or his land from the payment of the rent claimed.

The question in this case is quite analogous to that decided in *Ingersoll* v. *Sergeant*, (1 *Whart.* 337.) In that case, a lot of ground in the city of Philadelphia had been conveyed in fee, the grantor reserving to himself and his heirs an annual rent of $351. Ingersoll, the plaintiff, had, through sundry intermediate conveyances, become the owner of the lot charged with the rent. On the 30th of April, 1819, Ingersoll conveyed a part of the lot to Jonathan Smith. In the deed there was no condition that Smith, the grantee, should assume or pay any part of the rent. Sergeant, who had become the assignee of the rent, subsequently to the conveyance from Ingersoll to Smith, re-

leased to Smith his part of the lot. After the execution of this release, Sergeant, the owner of the rent, assigned it to Mrs. Sergeant, the defendant, and she distrained upon Ingersoll's part of the lot for the whole rent. Ingersoll brought replevin, and the defendant avowed for rent in arrear. The question thus raised was, whether the release to Smith operated as an extinguishment of the whole rent. The case was twice argued by the most distinguished counsel at the Philadelphia bar, and it was held, after a most elaborate examination by the court, that the release had the effect to extinguish only so much of the rent as should be in proportion to the comparative value of the land bought of the plaintiff by Smith.

It will be perceived, upon a comparison of the facts in the case with those of the case under consideration, that, while in the latter case the several owners of the land charged with the rent had agreed between themselves that each should pay his just share of the rent, in the former Ingersoll had conveyed to Smith, with covenants of warranty, and without any agreement on the part of Smith that his part of the lot should be chargeable with any part of the rent. This element, in the present case, so far as it affects the question at all, is obviously in favor of the position assumed by the plaintiff's counsel. There had been not only a partition of the land between the owners, but they had so far as they were able to do it, severed the rent chargeable upon their land. The plaintiff but ratified their own contract when he assumed to deal with one of them in respect to his share of the rent without regard to the other.

Farley v. *Craig*, (6 *Halstead*, 262,) involved a similar question. That was ejectment for the non-payment of rent. One Logan had granted a tract of land containing 382 acres, to Joseph Smith, reserving certain rents: after the death of Smith, the first tenant, 200 acres of the land came to the father of the defendant, who paid rent thereon. After his death, the 200 acres was divided between his two sons, who took their respective shares in severalty, and each paid to the plaintiff, for several years, the half of their father's rent. The action was against one of the sons, for the non-payment of the rent upon

his share of the 200 acres. The court was divided in opinion upon the plaintiff's right of re-entry depending on the provisions in the original conveyance, but both the judges who delivered opinions in the case, agreed that the plaintiff showed a right to the rent apportioned upon the defendant's share of the 200 acres. "Rent charges," said Drake, J., "may be apportioned by contract or by descent. They may be divided by assignment or by the act of law. In this case, we find the father of the defendant, forty years ago, paying a special amount of rent for a part of the lands originally subjected to the rent charge, and it was continued for nearly thirty years by the father, mother and the defendant himself. This is abundant evidence of an apportionment by contract. And when the defendant and his brother divided the farm, equally, in value, and each, for several years thereafter, paid the half of the rent, *it is evidence of the agreement of all the parties thereto, and should not now be disputed.*" (*See also Van Rensselaer* v. *Bradley*, 3 *Denio*, 135; *Nellis* v. *Lathrop*, 22 *Wend.* 121.)

It was well said by the plaintiff's counsel upon the argument, that no case is to be found in which rent, though it be a rent charge, if in its nature it be divisible and apportionable, has been held to have been extinguished as to the tenant of one parcel of the land by a release to another tenant of a different parcel held by him in severalty.

The remaining question in the case is whether the plaintiff is entitled to recover the $25 proved upon the trial as the estimated value of the defendant's share of one day's service with carriage and horses reserved in the leases. It was proved on the trial that the plaintiff had received compensation for one day's service, and the defendant's counsel insisted that the reservation in the lease was thereby satisfied. Whether this is so or not, must be determined by a reference to the reservation itself. By its terms, there is reserved to the grantor, &c. "yearly and every year, the yearly rent of twenty-eight skipples of wheat and four fat fowls, *and perform* one day's service with carriage and horses, the *first* payment to be made on the

first day of January," &c. I have, in quoting from the instrument, omitted some intermediate language which relates to the place where the wheat and fowls are to be delivered, and which is clearly parenthetical. The rent reserved consists of three things; the wheat, the fowls, and the day's service. In respect to the latter, the terms of the reservation are inapt and ungrammatical. The word "perform" is used as a *verb* without either *a noun or pronoun* for a nominative. To give effect to what seems to have been the intention of the parties to the instrument, instead of using the word as a *verb*, it should have been used in the form of a *participle* or a *noun*. The reservation would then read as follows: "Yielding and paying therefor, yearly and every year, the yearly rent of twenty-eight skipples of wheat and four fat fowls, and *performing* one day's service," &c. or, "yielding and paying &c., the wheat and fowls and *the performance* of one day's service" &c. I think the fair construction of the whole sentence requires that the words "yearly and every year," and the words "yearly rent" should be made applicable to the performance of the day's service as well as the other items of the rent; so too, the succeeding provision that the *first payment* shall be made on the second day of January, next after the execution of the instrument, seems, from the whole structure of the sentence, to refer not less to the performance of the day's service than to the wheat and the fowls. This view of the question is strongly supported by the uniform practical construction that this reservation, found in so many of the manor leases, has received for more than half a century. I am of opinion, therefore, that the judgment at the circuit should be affirmed.

[Albany General Term, May 4, 1854. *Wright*, *Harris* and *Watson* Justices.]

The People *ex rel.* Kipp and others *vs.* Finger and others, commissioners of highways of the town of Livingston.

24 341
35 650

Where the legislature passed an act requiring commissioners of highways to build a bridge over a creek, "*upon* or *near* the site" of the old bridge which had been erected upon, and in connection with, a public highway; the object of the legislature being to have the bridge re-constructed, so that travel upon the road might be resumed; and a majority of the commissioners, under the authority given them by the act, to fix the site of the new bridge, left the highway, and passing up the stream more than a quarter of a mile, away from any public highway, assumed to locate the site of such new bridge, at a point upon the lands of private individuals, and without their consent, involving an additional expense for right of way; *it was held* that the commissioners went beyond the power conferred upon them by the legislature; and that a mandamus, directing them to proceed and erect the bridge upon the site thus selected, could not be issued. Wright, J., dissented.

Held, further, that the statute authorizing the erection of the bridge, not having directed that the land of individuals should be taken for that purpose, and no intention of the kind being evinced, and no provision made for compensation to land owners, the commissioners had no authority to take private property, to enable them to build the bridge.

Where an alternative mandamus is issued, and the defendants make their return, and the relators, instead of demurring thereto, plead, taking issue upon all the material allegations in the return, they thereby admit that, upon its face, the return is a sufficient answer to the case made by the alternative writ. And if no material fact stated in the return is disproved upon the trial, the defendants will be entitled to a verdict in their favor.

APPEAL from a judgment at special term directing that a peremptory mandamus issue. By an act of the legislature, entitled "An act to provide for building a bridge over the Roeliff Jansen's kill, in the town of Livingston, in the county of Columbia, and for the payment of the expenses thereof," passed April 5, 1853, (*Laws of* 1853, *p.* 198.) the commissioners of highways of the town of Livingston were required to build a bridge over the Roeliff Jansen's kill, *upon or near the site of the old bridge* over said kill, near where the block factory stood in said town, and for such purpose were authorized to borrow money, &c. The commissioners were also required to give notice in writing to the commissioners of highways of each of the towns of Clermont and Germantown to meet with them at the

house of Jacob I. Cole, in said town of Livingston, on some day before the first day of May, to determine on the site for building said bridge, which site, it was declared, might be fixed by the commissioners of highways of any two of said towns. Pursuant to this requirement, and notice for that purpose duly given, the commissioners of the three towns met at the place mentioned in the act, on the 30th of April 1853, and by the vote of the commissioners of Clermont and Germantown, determined that the site of the new bridge, should be "*at a place further up the creek, at a place known as the big rock, being a point at or near the south termination of a line fence between Alexander Crofts and Christian Cooper's lands, in the town of Livingston.*" The commissioners of Livingston protested against the location of the site at big rock, "as contrary to the spirit of the statute touching the site of the bridge." The commissioners of Livingston having refused to proceed to build a bridge at the site which had thus been fixed, a writ of *alternative mandamus* was, upon the application of the relators, issued against them, on the 31st of August, 1853, requiring them immediately to take the necessary steps provided in the act for building the bridge, or shew cause to the contrary on the second Tuesday of September. To this writ the defendants returned that they had offered and proposed, in good faith, to carry out the provisions of the act by erecting a bridge in the place where the former bridge had stood, *or so near thereto as to accommodate the travel upon the existing public highway, on both sides of the stream;* that the site of the old bridge is distant seven rods easterly of the block factory, upon a public highway leading from the towns of Clermont and Germantown to Catskill and Hudson; that the place fixed by the commissioners of Clermont and Germantown, as the location of the bridge to be erected, is distant in a direct line up said stream, easterly from the location of the old bridge, one hundred and twelve rods, and that there is no public highway laid out to the proposed location; that from the new site to the nearest point of the public highway in the town of Livingston, is 146 rods, across improved and cultivated lands, the owners of which are

opposed to the laying out of a highway across their lands, which are valuable, and that such highway, if established, would subject the town of Livingston to seven or eight hundred dollars additional expense.

The relators, by plea, denied severally all the statements in the return. The issues thus joined were tried before Mr. Justice WRIGHT, at the Columbia circuit, in January 1854, without a jury. On the trial, it was proved that on what was known as the river road, leading from the towns of Clermont and Germantown to Catskill and Hudson, there had been a bridge across the Roeliff Jansen's kill. This bridge was located some seven rods from the block factory, and had been swept away about two years before. It was 115 feet in length across the stream, and was what was called, by the parties, the old site. It was within a quarter of a mile of the Hudson river. The site selected on the 30th of April, at the point known as the big rock, is from 87½ to 112 rods up stream from the old site, and almost half a mile from the Hudson river. At this point, the stream is about 80 feet wide. The kill divides the towns of Livingston and Clermont, and on the Livingston side there is a rock formation at the new site.

At the new site, on the Clermont side, the lands are in possession of and owned by Jacob P. Miller, who was an applicant for the new bridge, and one of the relators. On the 4th of May, 1853, the commissioners of Clermont laid out a road from the point opposite the big rock, down the stream on the south bank thereof, through the lands of Miller, and connecting with the highway leading to the old site. This was done with the consent of Miller. The order of the commissioners was filed on the 8th of May. On the Livingston side of the creek the lands, to within eight or ten feet of the site, are enclosed and improved, and in the possession of Alexander Crofts and Christian Cooper. Crofts' exterior fence runs within some ten feet of the big rock. Outside of that fence there is no improvement. Some years since, and before the old bridge was erected, the road crossed the stream above the block factory, and the fording place on the Livingston side was about

three rods below the big rock, and from that point the road was continued in the town of Livingston and across the lands of Crofts, now enclosed. This road was attempted to be discontinued about the year 1838. An order was made by two commissioners of the town of Livingston, discontinuing the road, the order not showing upon its face that all the commissioners were notified of the meeting at which it was made. The road has been fenced in some 12 or 15 years. Upon these facts an order was made that a peremptory mandamus issue, and judgment was rendered against the defendants for costs. From this order and judgment the defendants appealed to the general term.

H. Hogeboom, for the relators.

K. Miller, for the defendants.

HARRIS, J. The mandate of the legislature is, that the commissioners of highways of the town of Livingston shall build a bridge over the Roeliff Jansen's kill, *upon or near the site of the old bridge*. But there may have been more than one old bridge over the kill. The act itself speaks of another bridge over the same stream, known as the Blue Store Bridge. That is not the bridge intended. It is where a bridge once stood in the neighborhood of the old block factory. It is thus the legislature indicate the bridge they design to have rebuilt. It is to be built "upon or near the site of the old bridge," which is "near where the block factory stood."

The object of the legislature in imposing this burden upon the towns which are required to contribute to the expense of the bridge, is apparent. There is a public highway leading north from the towns of Clermont and Germantown to Catskill and Hudson. Upon this highway a bridge had been erected over the Roeliff Jansen's kill. That bridge had been carried away, and thus the travel upon that road had been interrupted. The object of the legislature was to have the bridge re-constructed, so that travel upon the road might be resumed. The commissioners are therefore required to build a bridge "*upon*

or near the site of the old bridge." The rebuilding of the bridge was required for the accommodation of that portion of the public which might have occasion to travel upon that road. It was for this purpose that the legislature thought fit to direct the expenditure. The bridge was to be built in connection with, and to become a part of, the highway—a well-known and public thoroughfare.

There is no reason to suppose that the legislature intended that the line of the road should be changed. Certainly the act contains no authority to that effect. Nothing else seems to have been contemplated than the reconstruction of the bridge upon the line of the road as it then existed. And yet, I am not prepared to say, that had the proper authorities on each side of the stream seen fit to alter the line of the road, at the point of crossing, the site of the bridge would not have gone with the road. I am inclined to think it would. Though this was not the thing before the mind of the legislature, it would have given effect to the legislative intent. It would have provided for the travel upon the road. But even if the line of the road should not be changed, it might not be desirable to construct the bridge precisely upon the site of the old bridge. Within the limits of the road itself one point might be more eligible than another. A joint meeting of the commissioners of the three towns was therefore provided for, in the act, to determine upon the site. At this meeting, the commissioners of two towns "voted for a site at a place further up the creek, at a place known as the big rock, being a point at or near the south termination of a line fence between Alexander Crofts and Christian Cooper's lands." Against this the commissioners of Livingston protested, as contrary to the spirit of the act. Thus, the majority of the commissioners, under the authority given them by the act to fix the site of the new bridge, have left the road, for, and as a part of which, the bridge was to be built, and passing up the stream more than a quarter of a mile, away from any public highway whatever, have assumed to locate the site of the new bridge at a place known as the big rock, upon the

lands of private individuals, and without their consent. In doing this, I think they went beyond the power conferred upon them by the legislature.

It is claimed that the legislature, by requiring the bridge to be built "upon or *near* the site of the old bridge," and then authorizing the commissioners of the three towns, or a majority of them, to fix the site, has manifested an intention to endow the commissioners with a discretion sufficiently broad to cover what they have done. But I cannot assent to this latitude of construction. The word "near," which the legislature has employed in connection with the site of the new bridge, may be used as an incident to either time or space. In either case, it is used relatively, with reference to the subject to which it is applied. What would be *near*, in one case, would *not be near*, in another. In *The People* v. *Denslow*, (1 *Caines*, 177,) it was thought that a statute requiring a turnpike company to erect their gate near John Van Hoesen's house, had been complied with by erecting the gate within 33 rods of the house. On the contrary, in *Griffen* v. *House*, (18 *John.* 397,) where a turnpike company, with a road about 20 miles in length, were required to locate their easterly gate at such a place *near* the Massachusetts line as the president and directors should *direct*, it was held that a gate two miles and three quarters from the line, was too far off to be "near." In this very case, while the commissioners of Clermont and Germantown felt themselves at liberty to locate the new site at the big rock, because though distant more than a quarter of a mile, it was *near* the old site, they have themselves determined that the new bridge shall be built "at a point at or *near* the south termination of a certain line fence." Now, it is but a little more than a quarter of a mile from the south termination of the fence, at or *near* which the commissioners have determined that the new bridge shall be built, to the site of the old bridge. Certainly the site of the old bridge is just as near to the point selected by the commissioners as the termination of the fence designated, is to the site of the old bridge. Why, then, may not the commissioners of Livingston proceed to build their bridge upon the old site,

assuming that it is sufficiently near to the point mentioned in the location to answer the terms used by the commissioners to designate the new site? No one would pretend that this could be done, for the reason that it is obvious that no such thing was intended. We readily see from the circumstances, that the commissioners, who exercised the power of determining the site, meant that the new bridge should be built, not at the old site, but at some point *very near* to the south termination of the fence at the big rock. By the same mode of reasoning, I am led to the conclusion that the legislature intended that the new bridge, whether built upon or *near* the site of the old bridge, should be built upon the line of the road leading from Clermont and Germantown to Catskill and Hudson; and that, in attempting to have it built away from that road, in the expectation, perhaps, that the public would by some means have the road brought to the bridge, the commissioners went beyond their power.

But again, the land upon which the new bridge is to be built, according to the determination of the commissioners, is private property. The bed of the stream is not less so than the land upon the shore. The public have done nothing to acquire a right of property in, or even a right to use this land. The subsequent effort of the commissioners of Clermont to provide a remedy for this difficulty, by laying out a road along the southerly margin of the stream from the road to the new site, was entirely abortive. The difficulty still exists. The land upon which the new bridge is to be built is private property. The legislature has not directed it to be taken, and no authority having jurisdiction for that purpose has taken it for any public use. I confess, therefore, that I am unable to see why the commissioners who should undertake to build a bridge upon this new site, would not, the moment they should enter upon the land where it is to be built, and as often as they should do so, make themselves trespassers. I do not, of course, deny the power of the legislature to direct that land be taken for a bridge, as well as for a rail road or a canal; but the difficulty in the

case is, that the legislature has evinced no intention to have this done, and no provision has been made for compensation to the owner, without which even the legislature could not take it.

There is another feature of this case which, though not noticed upon the argument, seems to me to deserve a passing notice. A writ of alternative mandamus was served upon the defendants, to which they made their return. To this return the relators were at liberty either to demur or to plead. They elected to plead, and by their plea took issue upon all the material allegations in the return. For the determination of this issue, the statute provides that the like proceedings shall be had, as might have been had if the relators had brought an action on the case against the defendants for a false return, and that in case a verdict be found in favor of the relators, they should recover damages and costs, in like manner as if it had been an action on the case. The trial of the issue between the parties, therefore, is to be regarded as the trial of an action against the defendants for a false return. Of course the relators hold the affirmative of the issues. The return is to be taken as true, until it is falsified upon the trial.

In this case the trial was had without a jury. The facts found by the judge are substantially the same as those stated in the return. Not a single allegation upon which the relators have taken issue, has been disproved. Had the trial been before a jury, their verdict must have been for the defendants. And yet the same judgment has been rendered against the defendants, as if there had been a verdict against them. Not only has a peremptory mandamus been awarded, but a judgment has been rendered against them for costs, to the amount of $152.78. This, I think, was erroneous. By pleading to the return, the relators admitted that, upon its face, it was a sufficient answer to the case made by the alternative writ. No material fact stated in the return having been disproved upon the trial, the defendants were entitled to a verdict in their favor, and of course to judgment.

I am of opinion, therefore, that the judgment ought to be reversed, and that, upon the whole record, the defendants are entitled to judgment.

WATSON, J., concurred.

WRIGHT, J., dissented.

Judgment for defendants.

[ALBANY GENERAL TERM, December 4, 1854. *Wright*, *Harris* and *Watson*, Justices.]

VAN RENSSELAER *vs.* GIFFORD.

The fact that a lease or grant was executed to two persons, jointly, will not in any way affect the liability of an individual as assignee of a part of the premises charged with the rent.

If the grantees have made partition of the demised premises, between themselves, and a portion thereof has come to a third person, by descent or purchase, he is liable for the proportionate share of the rent chargeable thereon, as assignee of the lessee.

His liability is the same if he has purchased from both the grantees. Inasmuch as the covenant to pay the rent reserved in the lease runs with the land, it is enough to establish the liability of an assignee that he has, in some way, succeeded to the rights of the original grantees, in a part of the lot. How he acquired such rights is immaterial.

Where several persons, being the owners of land chargeable with rent, as tenants in common, make partition between themselves, each assuming the payment of his equitable share of the rent, the purchase of a portion of the land, by the owner of the rent, will not extinguish the liability of the person owning the other portion of the premises.

After a contract has been entered into, between the tenants, for the severance of their interests, each is at liberty to deal with the lessor as he may see fit, without reference to the other, and to extinguish his liability, either by a release or a sale.

The lessor may make himself a party to such an agreement, as well by purchasing the land of one of the tenants and thus extinguishing the rent by merger, as by a release.

No dealing between the owner of the rent and the owner of a part of the land, thus held in severalty, can affect either the rights or the liability of the owner of the residue.

Van Rensselaer *v.* Gifford.

Evidence that a person occupying a portion of premises originally leased to several persons jointly, has settled with the lessor for the rent due upon that part of the demised premises occupied by him, is, in the absence of any proof to the contrary, sufficient to justify the inference that a division of the lands has been made between the different owners, and that they have, by contract made an apportionment of the rent between themselves.

A rent payable in fowls and service with carriage and horses is not, in its nature, indivisible, or incapable of being apportioned.

Where the owners of land chargeable with rent which cannot be apportioned, make a partition between themselves, each becomes liable for the whole rent; *it seems.*

THIS action was brought to recover rent. It was tried at the Albany circuit, in April, 1854, before Mr. Justice HARRIS. The plaintiff gave in evidence a lease in fee executed by Stephen Van Rensselaer, his father, to Samuel Rider and Elihu Gifford, bearing date the 15th of February, 1799, for lot number 15 in the town of Rensselaerville, reserving a rent of 22½ bushels of wheat, four fat fowls and one day's service with carriage and horses. The plaintiff also proved that by the will of his father he had become the devisee of the rent claimed. A witness for the plaintiff testified, that in 1841 the defendant had settled for the rent on the east half of the lot described in the lease, by giving his note therefor, and that the amount of rent in arrear on the east half of the lot, at the time of the commencement of the suit, with interest thereon, was $250.89. Of this sum, $11 was for the day's service, and $2.75 for fowls, and $5 for interest on these items. Upon his cross-examination the witness testified, that Joel Rider was in possession of the west half of the lot, and that the defendant claimed to be in possession of the east half. The plaintiff having rested, the defendant gave in evidence a sheriff's certificate, from which it appeared that on the 25th of March, 1844, the sheriff of the city and county of Albany, by virtue of an execution against Joel Rider, sold his right, title, claim, interest and estate in and to the west half of lot number 15 in Rensselaerville, and that upon such sale the plaintiff became the purchaser. Also, a sheriff's deed executed in pursuance of such sale, bearing date the 3d of July, 1845. The testimony being closed, the counsel for the

defendant insisted that, inasmuch as the lease was executed to Samuel Rider and Elihu Gifford, their heirs and assigns jointly, and the covenants on their part were joint, and not several, covenants, the action should have been against Joel Rider and the defendant jointly. The court refused so to decide, and the defendant's counsel excepted. The defendant's counsel further insisted, that the purchase of half the premises by the plaintiff, under the execution against Rider, extinguished the rent upon the defendant's half of the lot, from the time of such purchase, and that, therefore, the plaintiff was not entitled to recover for any rent accruing after such sale. The court refused so to decide, and the counsel for the defendants excepted. The defendant's counsel further insisted, that there could be no apportionment of the fat fowls and the day's service reserved in the lease, and therefore, after the purchase of the interest of Joel Rider in the lot by the plaintiff, he could not recover for this part of the rent reserved. The court refused so to hold, and the defendant's counsel excepted. The counsel for the defendant further insisted, that the plaintiff was only entitled to recover for one day's service with carriage and horses. The court declined so to decide, and the defendant's counsel excepted. The court decided that the plaintiff was entitled to recover the sum of $250.89, as proved. To this decision the defendant's counsel excepted. Judgment having been entered, upon the decision, the defendant appealed to the general term.

C. M. Jenkins, for the plaintiff.

A. J. Colvin, for the defendant.

By the Court, HARRIS, J. The fact that the original lease or grant was to two persons jointly, cannot in any way affect the liability of the defendant as assignee of a part of the premises charged with the rent. If, as is probable, the grantees made partition of the lot between themselves, and the east half of the lot had come to the defendant by descent or purchase, he would be liable for the proportionate share of the rent chargeable

thereon as assignee of the lessee. His liability would be the same, if he had purchased from both the grantees. As the covenant to pay the rent reserved in the lease runs with the land, it is enough to establish the defendant's liability that he has, in some way, succeeded to the rights of the original grantees in a part of the lot. How he acquired such rights is quite immaterial. (*Van Rensselaer* v. *Bradley*, 3 *Denio*, 135. *Same* v. *Gallup*, 5 *id.* 454.)

It is claimed by the defendant that though he may have become liable as assignee of the east half of the lot for its proportionate share of the rent, yet that the plaintiff, by his purchase of the other half at the sheriff's sale, in 1844, released him from such liability. Upon this point it might be sufficient to say, that it does not appear that the plaintiff, by means of his purchase, acquired any title or interest in the premises described in the deed. No evidence was given to show that at or before the time of the sale, the defendant in the execution had any interest in the lot liable to such sale, or if he had, that any judgment had been recovered against him which was a lien thereon. Nor did it appear that the plaintiff had ever acquired possession of the premises under his deed from the sheriff. On the contrary, it appeared affirmatively that, at the time of the trial, the defendant in the execution was himself in possession. Assuming, therefore, that a purchase of part of the premises by the plaintiff would operate to extinguish his claim for rent upon the residue, the facts of the case would not warrant the application of the rule.

But it has just been held, in *Van Rensselaer* v. *Chadwick*,(*a*) that where several persons, being the owners of land chargeable with rent, as tenants in common, make partition between themselves, each assuming the payment of his equitable share of the rent, a release to one of the owners does not extinguish the liability of the other. The same principle is applicable to the case of a purchase of a portion of the land by the owner of the rent. The tenants, having by their own contract severed their interest in the land, and each, independently of the other, agreed to pay

(*a*) Ante, p. 333.

his just proportion of the rent chargeable upon all the land, each is at liberty to deal with the owner of the rent as he may see fit, without reference to the other, and, either by a release or a sale, to extinguish his liability. The tenants having, as between themselves, agreed to become severally liable, each for his own share of the rent, the owner of the rent might make himself a party to that agreement, as well by purchasing the land of one of the tenants and thus extinguishing the rent by merger, as by a release. No dealing between the owner of the rent and the owner of a part of the land, thus held in severalty, could affect either the rights or the liability of the owner of the residue.

In this case, the evidence of a partition of the land and a division of the rent between the owners, is not as conclusive as it was in the case of *Van Rensselaer* v. *Chadwick*, but I think it is sufficient to sustain the decision at the circuit. In *Farley* v. *Craig*, cited in the opinion of the court in *Van Rensselaer* v. *Chadwick*, it was considered that the payment of a specific amount of rent for a specified part of the lands subject to the rent, for a series of years, was abundant evidence of an apportionment of the rent by contract between the several owners of the land. The evidence in this case shows that, in 1841, the defendant settled for the rent upon the half of the lot which he then had in possession, and which he continued to hold up to the time of the trial. In the absence of any proof to the contrary, I think this evidence was sufficient to justify the inference that a division of the lands had been made between the different owners, and that they had, by contract, made an apportionment of the rent between themselves. Indeed the fact was not disputed at the trial. It seems to have been assumed that the defendant was the owner of the east half of the lot, and that the owners had each assumed to pay their proportionate share of the rent.

Again; it is insisted that it was error to allow the plaintiff to recover for that part of the rent payable in fowls and service with carriage and horses, for the reason that such rent is, in its nature, indivisible, and therefore cannot be apportioned. I do not think the premises upon which the argument rests are tena-

ble. Is such rent, in its nature, indivisible? In the case under consideration, what would prevent the apportionment of the four fat fowls and the day's service to be rendered annually between the two tenants of the land chargeable therewith? I am unable to see why such division would not be as practicable as in any other case. But if it be conceded that these rents are indivisible, it seems from the authorities cited by Mr. Justice Jewett in *Van Rensselaer* v. *Bradley*, (3 *Denio*, 142,) that where the owners of land chargeable with rent which cannot be apportioned, make a partition between themselves, each becomes liable for the whole rent. If this be so, and by the division of the land the defendant and the owner of the other half had each become chargeable with the whole rent payable in fowls and service, the extinguishment of that part of the rent chargeable upon the other half of the land could not affect the defendant's liability.

The only remaining point made upon the trial was, that which relates to the construction to be given to the provision in the lease reserving, as a part of the rent, one day's service with carriage and horses. This point has already been considered and determined in *Van Rensselaer* v. *Chadwick*. I am of opinion, therefore, that the judgment at the circuit should be affirmed.

Judgment affirmed.

[Albany General Term, May 1, 1855. *Wright*, *Harris* and *Watson*, Justices.]

24 355
24 362

HENRY BLACKWELL, adm'r &c. of John Maher, deceased, *vs.* EBENEZER WISWALL.

The only principle upon which one man can be made liable for the wrongful acts of another is, that such a relation exists between them that the former, whether he be called principal or master, is bound to control the conduct of the latter, whether he be agent or servant.

The maxim of the law is *respondeat superior*. It is only applicable in cases where the party sought to be charged stands in the relation of *superior* to the person whose wrongful act is the ground of complaint.

Where the defendant, who had obtained from the proper authority an exclusive right and license to run a skiff ferry across a river, permitted another person, called a lessee, to exercise the right, not as the defendant's agent or servant or for his benefit, but on his own account, and, owing to the negligent and unskillful conduct of the man rowing and having charge of the skiff, the same was sunk or swamped, and the plaintiff's intestate was drowned; *it was held*, that whether the person exercising the right of ferrying under the defendant's license was the same man who was rowing and had charge of the skiff, or his employer, the relation of superior and subordinate did not exist between him and the defendant. And that before the defendant could be made liable for the negligence or unskillfulness of the person having charge of the boat, it must appear that the relation of master and servant existed between them.

Held also, that although, as between the defendant and the government, he might have been guilty of a breach of duty when he made the contract to lease the ferry to another, yet that such breach was not, *per se*, a wrongful act for which an action would lie, in favor of a stranger. That it would still be necessary to show, in order to maintain an action founded upon the mere fact that the defendant had thus leased the ferry, that by this very act he had been guilty of a wrong which had resulted in injury to the plaintiff.

DEMURRER to complaint. The plaintiff stated that in May, 1852, the defendant was duly licensed to run a skiff ferry, for ferriage, from the city of Troy to West Troy, across the Hudson river, for the period of three years, and that, up to the 13th of October, 1854, he continued to hold said license, and to run said skiff ferry, *by his lessee, and by persons acting and ferrying under said license*, and that, *being such ferryman*, John Maher was taken, as a passenger for ferriage, on board a skiff *run at defendant's said ferry pursuant to said license*, and that, owing to the overloading of the skiff, the improper stowing of passengers, and the negligent and unskillful conduct of the man rowing and having charge of the skiff, the same was

sunk or swamped. and Maher was drowned, and that the plaintiff had been duly appointed administrator of his estate.

To this complaint the defendant demurred, specifying for cause, that it did not contain facts sufficient to constitute a cause of action.

D. Gardner, for the plaintiff.

D. L. Seymour and *G. Van Santvoord*, for the defendant.

HARRIS, J. The allegation in the complaint is, that Maher was drowned through the negligence and unskillfulness of "*the man* rowing and having charge of the skiff." *Whose man* he was, does not appear. If it had been alleged that he was the agent or servant of the defendant, it would have been sufficient to sustain the complaint, upon demurrer. It is alleged that the skiff was run at the defendant's ferry, and pursuant to the defendant's license. But this allegation is not sufficient to warrant the inference that "the man rowing and having charge of the skiff" was in the defendant's employ. On the contrary, when considered in connection with the further allegation in the complaint, that the defendant continued to hold the license and to run the ferry *by his* lessee, the inference may, perhaps, be justified, that the defendant had authorized some other person to run the ferry, and that "the man" rowing and having charge of the skiff was the servant of the defendant's lessee. It was assumed upon the argument, by the counsel for both parties, that this was the construction to be put upon the language of the complaint, and that the question involved in this issue is, whether the defendant is liable for the wrongful act of his lessee.

The only principle upon which one man can be made liable for the wrongful acts of another is, that such a relation exists between them, that the former, whether he be called principal or master, is bound to control the conduct of the latter, whether he be agent or servant. The maxim of the law is *respondeat superior*. It is only applicable in cases where the party sought to be charged stands in the relation of *superior* to the person

whose wrongful act is the ground of complaint. In this case, it is not pretended that the man, whose alleged negligence and unskillfulness resulted in the death of the plaintiff's intestate, was the agent or servant of the defendant, or in any way subject to his direction or control. The defendant had obtained from the proper authority an exclusive right to run the ferry. This right he permitted another person, who is called a lessee, to exercise, not as his agent or servant, or for his benefit, but on his own account. Whether the person exercising this right of ferrying under the defendant's license was the same man who was rowing and had charge of the skiff, or his employer, does not appear, but in neither case could the relation of superior and subordinate exist between him and the defendant. (*See Stevens* v. *Armstrong*, 2 *Selden*, 435; *City of Buffalo* v. *Holloway*, 3 *id.* 493; *Pack* v. *The Mayor &c. of New York*, 4 *id.* 222.)

Upon this question, the case of *Felton* v. *Deall*, (22 *Verm. R.* 170,) is directly in point. The legislature of this state had granted to Deall the right, for a specified time, to maintain and use a ferry across Lake Champlain from Ticonderoga to Shoreham. Having established the ferry, Mrs. Deall, the licensee, entered into a contract with one Hobbie, by which he was to keep and manage the ferry, at his own expense of labor, for one year. The expenses of repairs were to be equally borne by the parties, and the receipts of the ferry were to be equally divided between them. Hobbie further agreed, that he would not allow any but a faithful, honest, obliging and temperate man to attend the ferry, and that he would be responsible for damages occasioned by willful misconduct or neglect in its management. While Hobbie had charge of the ferry under this contract, Felton, the plaintiff, went upon the ferry boat with his horse and wagon, for the purpose of crossing over from Ticonderoga to Shoreham. The boat was upset, and the plaintiff and his property injured. To recover damages for this injury, the action was brought against Mrs. Deall. It was held, that the contract being such as to vest the occupancy and control of the ferry in Hobbie, as the tenant rather than the servant of the defendant, she was not responsible for his acts.

It is supposed that there is something in the fact that the license to run the ferry was granted to the defendant which affects the question of his liability. But I think not. I agree with the plaintiff's counsel that the license was, in its nature, a personal trust. The court is only authorized to grant licenses to such persons as they deem suitable. It has been held that such a license is not assignable. (*Harding* v. *The Steam Boat Maverick*, 5 *Law Reporter*, 106.) But yet, I am unable to see how this concession can be made to aid the plaintiff in sustaining his action.

The defendant, before receiving his license, was required to enter into a recognizance to the people, with a condition that he would faithfully keep and attend the ferry, with such and so many sufficient and safe boats, and so many men to work the same, as should be deemed necessary, &c. It is further declared, that a violation of the condition of the recognizance shall be deemed a misdemeanor, and that, upon conviction, the person guilty of such violation shall be subject to a fine, for each offense, not exceeding $25, and further, that on proof of such conviction, the court shall direct the recognizance to be estreated for the use of the people of this state. (1 *R. S.* 526, §§ 1, 4.) If the defendant had, in any respect, failed to comply with the conditions of his recognizance, he might have been proceeded against in the manner prescribed by statute. So, also, it is provided that in case any person, except in certain specified counties, shall use any ferry for transporting across any river, stream or lake, any person &c., for profit or hire, unless authorized in the manner prescribed, such person shall be guilty of a misdemeanor, and, on conviction, shall be subject to fine, &c. (1 *R. S.* 527, § 8.) If, therefore, the license granted to the defendant did not authorize him to transfer the right to use the ferry to an assignee or lessee, I do not see why the person who should assume to run the ferry under such an assignment or lease, might not be liable to the penalties incurred by any person who may use a ferry without legal authority. But though this be so, the fact that both the defendant and his lessee may have exposed themselves to statutory penalties, does not affect the defendant's liability in

this action. It is still true, in this case as in every other, that before the defendant can be made liable for the negligence or unskillfulness of the man who was rowing and had charge of the boat, it must appear that the relation of master and servant existed between them. Upon the allegations in the complaint this cannot be pretended.

A case very similar to this is found in *Ladd* v. *Chotard*, (1 *Alab. Rep.* 366.) In that case, the defendant was the licensee of a ferry at the falls of Cahawba. He had given the bond required by law. The action was brought to recover the value of a wagon and horses which had been lost in crossing the ferry. It was proved on the part of the defendant, that at the time of the loss, the ferry was in possession of one Blake, to whom it had been rented by the defendant, and who was entitled to the ferriage. By a statute of Alabama it was declared, as in this state, that no person should open or establish a public ferry without license, and a bond and security as prescribed. Yet it was held that the action would not lie against the lessor of the ferry, for the reason that the tenant of the ferry was not his servant.

The case of *Blake* v. *Ferris*, (1 *Selden*, 49,) is also quite analogous to this. There, Ferris had obtained permission from the municipal authorities of New York to open one of the streets for the purpose of constructing a sewer. His license, which was in writing, contained an express provision that he should cause proper guards and lights to be placed at the excavation of the drain, for the prevention of accidents, and be answerable for any damages or injuries which might be occasioned to persons, animals or property, in any manner connected with the construction of the sewer. Ferris having obtained this license, contracted with one Gibbons to furnish all the materials and build the sewer, for a stipulated price. While Gibbons was engaged at the work, a carriage and horses belonging to Blake were driven into the open excavation, and injured. To recover damages for this injury, the action was brought against Ferris. The superior court allowed a recovery, but the judgment was reversed by the court of appeals. The unanimous judgment of the court was

pronounced by Mr. Justice Mullett. The case was extremely well considered, and the opinion exhibits great clearness and strength of argument. The judge assumed, for the purpose of considering the question, that Ferris had, by means of his license, a lawful right to construct the sewer himself, or by his agents or servants, and that he would be responsible to third persons for all injuries occasioned by the negligent or improper manner in which he exercised that right. He further assumed, that Ferris had the right to let, by contract, the execution of the work to another person, who, as to the right to make the sewer, might be regarded as representing Ferris and be protected under his license, and also that Ferris would be liable to third persons for injuries resulting from an improper exercise of the right of letting the work by contract. But it was held, that the action could not be sustained, unless the fact could be established that Ferris occupied the position of *superior* of the persons whose negligence or misconduct was the occasion of the injury, and had the powers of one in that position; and, upon this point, that the contract with Gibbons did not constitute him the agent or servant of Ferris, nor authorize him to pledge the responsibility of Ferris for the conduct of his servants, or any thing else that might be done in the execution of the contract.

This decision, it seems to me, completely disposes of the question in this case. The defendant, like Ferris, had been entrusted with authority to do certain things which others might not do, and which, to some extent, involved public interests. The defendant, like Ferris, instead of doing what he had permission to do himself, or by his agents or servants, entered into a contract with another person to do it, at his own expense and with his own servants. If, in *Blake* v. *Ferris*, the contract with Gibbons did not create the relation of *superior* and *subordinate* between Ferris and Gibbons, in respect to those acts which belonged to the practical execution of the work, or the employment of men to execute it, I am unable to see how it can be maintained that such relation existed between the defendant and the person authorized by him to run his ferry at his own expense

and for his own advantage. (*See also, upon this point, Heimstreet* v. *Howland*, 5 *Denio*, 68.)

Nor have I been able to perceive how the plaintiff's case could be helped by establishing the fact that the defendant, in letting his ferry to another person, was chargeable with a breach of duty. This action is for a *wrong*. It can only be maintained when the death for which the plaintiff sues has been caused "by wrongful act, neglect or default." Let it be conceded that, as between the defendant and the government, he was guilty of a breach of duty when he made the contract to lease the ferry. Such breach was not, *per se*, a wrongful act for which an action would lie in favor of a stranger. It would still be necessary to show, in order to maintain an action founded upon the mere fact that the defendant had thus leased the ferry, that by this very act he had been guilty of a wrong which had resulted in injury to the plaintiff. It was upon this principle, that the case of *Thomas* v. *Winchester*, (2 *Selden*, 397,) was decided. Winchester had carelessly placed upon a poisonous medicine the name of a harmless article. It had been sold by him, and after passing through several hands, was administered to the plaintiff's wife and resulted in serious injury. It was held that, without regard to any contract, Winchester was liable for the injury, upon the ground that in putting a false label upon a poisonous article of medicine, he was guilty of a wrongful act which caused the injury for which the action was brought.

It cannot be pretended that, in this case, the fact that the defendant allowed another person to exercise his right of ferrying was the cause of the death of Maher. It is the negligence or unskillfulness of the lessee of the ferry, or his servant, of which the plaintiff complains. He undertook for hire to carry Maher across the river. He failed to discharge the duty which this contract imposed upon him. His negligence or unskillfulness in the performance of what he had contracted to do in a prudent and skillful manner, was the cause of the death in question. For this, as we have seen, the defendant is not answerable. He is, therefore, entitled to judgment upon the demurrer, but with liberty to the plaintiff to amend his complaint within

twenty days after service of notice of this decision, upon the payment of the costs of the demurrer, to be taxed by the clerk of Rensselaer.

[Rensselaer Special Term, June 11, 1855. *Harris*, Justice.]

Note. This cause was heard upon an appeal from the above decision, at the Albany general term, in March, 1857, and affirmed upon the argument.

24 362
67 421
52h 54
29a 634
29a 641
51a 481

Selden *vs.* The Delaware and Hudson Canal Company.

The Delaware and Hudson Canal Company have the power, under their charter, to enlarge their canal.

But, though they possess this power, and, upon making compensation therefor, to take private property for that purpose, they are liable to remunerate individuals in damages, for any injuries they may sustain as the consequence of such improvement.

If, by means of the enlargement—a lawful act in itself—the lands of an individual are inundated, even though the work may have been performed with all reasonable care and skill, it is a legal injury, for which the owner is entitled to redress.

The owner of the land injured is not confined to the remedy provided in the 9th section of the company's charter. If he chooses to resort to his common law remedy by action, he may do so

MOTION for a new trial. The complaint stated that the defendants, in 1823, were incorporated, with power to make, construct and forever maintain, a canal, &c., substantially as stated in the 8th section of the act of incorporation; that under such power, the defendants had proceeded to construct a canal of such width, depth and dimensions, as they had determined to be suitable and proper, and that the same was completed in or before the year 1835; that in 1849 they commenced enlarging their canal by raising the embankments and waste weirs, and deepening and widening the trench, and damming up the water to a greater height, whereby the water so dammed up and elevated, soaked through, filled, flooded and

overflowed large tracts of the plaintiff's land, and greatly injured and almost ruined the same, and also the cellar of his dwelling house, and rendered his other lands unhealthy and sickly, and more difficult of access; and *also*, that the defendants took, and now occupy, a large strip of the plaintiff's land, and deposited earth and sand upon other parts of his land; for all which injuries the plaintiff claimed to recover damages. The answer of the defendants denied the material allegations of the complaint in respect to any injuries resulting to the plaintiff from the enlargement of the canal; and it was also denied that the defendants had taken any of the plaintiff's land. The cause was brought to trial in May, 1855, before Mr. Justice WRIGHT, at the Sullivan circuit. Upon the trial the plaintiff gave evidence tending to prove that injury had been done to his lands by the soakage of water and by the overflowing, and that his dwelling house had been injured by the raising of the water, whereby it flowed into his cellar, and that these injuries were occasioned by the acts of the defendants in enlarging their canal, in 1849 and 1850, through the plaintiff's lands. The plaintiff having rested, the defendants moved for a nonsuit, upon the ground that, by their charter, they had a right to make the enlargement through the plaintiff's land, and that the plaintiff was confined, in his remedy for damages, to the provisions of the 9th section of the defendants' charter, and that the plaintiff could not maintain an action at law for such damages. The court held that the defendants were authorized, by and under their act of incorporation, to make the enlargement proved, and that the plaintiff's remedy for any damage occasioned thereby, was that given by the 9th section of their charter, and that no action at law could be maintained for such damages, and, therefore, granted the motion for a nonsuit. An order was made directing the motion for a new trial to be heard, in the first instance, at a general term.

A. Thompson, for the plaintiff.

J. Hardenburgh, for the defendants.

By the Court, HARRIS, J. I have no doubt of the power of the defendants, under their charter, to construct the enlargement of their canal. My reasons for this opinion I had occasion to state in *Bruce* v. *the same defendants*, (19 *Barb.* 371.) But I think the plaintiff ought not to have been nonsuited. Though the defendants had the right to enlarge their canal, and upon making compensation therefor, to take private property for that purpose, they would still be liable to remunerate the plaintiff in damages for any injury he might sustain as the consequence of their improvement. If, by means of the enlargement—a lawful act in itself—the lands of the plaintiff have been inundated, even though the work may have been performed with all reasonable care and skill, it is a legal injury, for which the plaintiff is entitled to redress. This doctrine, which I regard as elementary in its character, is distinctly and broadly asserted in *Hay* v. *The Cohoes Company*, (2 *Comst.* 159.) In that case the defendants dug a canal upon their own land, as they were expressly authorized to do. They were not chargeable with negligence or want of skill in the manner of executing the work; yet it was held that they were liable for an injury upon adjoining premises. (*See also Bradley* v. *The N. Y. and New Haven R. R. Co.* 21 *Conn. Rep.* 294.)

But it is said that though the plaintiff may be entitled to compensation for any injury he may have sustained, he is confined to the remedy provided in the 9th section of the defendants' charter. It is true that the legislature has, in this section, provided a new and summary mode of proceeding, where a person owning land which has been injured by the necessary operations of the defendants is entitled to remuneration in damages. Either party may in such a case institute proceedings for the purpose of having the amount of the damages ascertained. But if the party injured should choose to resort to his common law remedy by action, there is nothing in the act which indicates any intention, on the part of the legislature, to deny him this choice. Had either party proceeded to have the dam ages ascertained in the manner provided in the charter, such a proceeding would, undoubtedly, have been a bar to this action

But as neither has seen fit to resort to the legislative mode of determining the damages, there is nothing in the terms of the act itself which can be construed to deprive the plaintiff of his remedy by action. (*See Crittenden* v. *Wilson*, 5 *Cowen*, 165.) I am of opinion, therefore, that the nonsuit should be set aside and a new trial awarded.

[Albany General Term, December 3, 1855. *Wright, Harris* and *Watson*, Justices.]

Van Rensselaer *vs.* Bonesteel.

24 365
40 216
46 451
19a 93
26a 558
26a 580

A covenant for the payment of rent, whether it be made by the grantee of lands in fee, reserving rent to the grantor, or by a lessee for a term, belongs to that class of covenants which are annexed to, and run with, the land.

The land itself is the principal debtor, and the covenant to pay rent is the incident. It follows the land upon which it is chargeable into the hands of the assignee.

The assignee takes the land with all the advantages to be derived from the covenants of the grantor concerning the land, and he assumes all the burdens resulting from the covenants of the grantee.

In order to sustain an action for rent, upon a lease in fee, against an assignee of the grantee, it is not requisite that the plaintiff should have a reversionary interest in the land, as in the case of landlord and tenant. It is enough that at the time of making the covenant an estate passed between the covenanting parties.

Where the grantor, in a lease in fee, reserves to himself an annual profit issuing out of the land, of so many bushels of wheat, and with it a covenant obligatory upon the grantee and all who may succeed to his interest in the land, that this shall be paid, an assignee of the grantee takes his title to the land charged with the burden which the original grantee had annexed to it.

By taking the benefit of the grant, the assignee voluntarily assumes the liabilities of the original grantee in respect to the subject of the grant.

The assignee is not the less liable, because he is the assignee of only a part of the thing to which the covenant is annexed. He is liable to pay his proportionate part of the rent.

Where, in an action for rent, the complaint alleged that the grantor and covenantee, V. R., died on, &c., seised of the rent in question; that by his will he devised this rent to W., whereupon and whereby he became seised of the rent, and that on, &c., W. conveyed the rent to A. W. and others, and the latter

conveyed the rent, and all arrears of rent, to the plaintiff; *Held*, that this was sufficient, not only to show that the plaintiff was entitled, as assignee of a chose in action, to sue for the rent due and unpaid at the time of the assignment to him, but that he was also the assignee of the covenant for the payment of the rent subsequently accruing.

The complaint in such a case need not allege that after the plaintiff became assignee of the rent, he continued to be the owner until the suit was commenced. In the absence of any allegation to the contrary, this is a legal presumption, and need not be alleged or proved.

In an action for rent, against an assignee of a portion of the demised premises, the owners of the other parts of the lot need not be made parties. After a partition, each owner becomes severally and independently liable for his proportionate share of the rent.

THIS was an appeal from an order of the special term overruling a demurrer to the complaint. It was alleged, in the complaint, that on the 13th of February, 1794, Stephen Van Rensselaer, now deceased, of the first part, and one Lodewick Bonesteel, as party of the second part, mutually made, executed, sealed and delivered an indenture, whereby the party of the first part did grant, &c. unto the party of the second part, his heirs and assigns, a certain lot of land, therein described, situate in the town of Grafton, in the county of Rensselaer, and containing 123 and five-tenths of an acre, to have and to hold the same, to the party of the second part, his heirs and assigns forever, yielding and paying therefor, yearly and every year, during the continuance of the grant, unto the party of the first part, his heirs and assigns, the yearly rent of ten bushels of good, clean, merchantable winter wheat; which rent, the party of the second part did thereby, for himself, his heirs, executors, administrators and assigns, covenant, promise and agree to pay; that by virtue of the indenture, the party of the second part became seised and took possession of the land; that the land has ever since been held and possessed, under and by virtue of the said indenture, by the party of the second part, his heirs and assigns; that the party of the first part was the owner of the land at the time of the execution of the indenture, and the owner of the rent, until his death; that after the making of the indenture, and before the 1st of January, 1848, all the estate, &c. of the party of the second part, in and to 82 and

two-tenths of an acre, a divided part of the land, came to and vested in the defendant, by assignment legally made; which land, by the acre, is equal in value with the residue of the lot; that the party of the first part died on the 26th of January, 1839, having, by his last will and testament, devised the rent to William P. Van Rensselaer, who assigned the same to Andrew White and others, by whom the same was assigned to the plaintiff, on the 19th of November, 1850; that after the death of the party of the first part, and after the defendant had become assignee of a part of the premises as aforesaid, and while he was such assignee, and before the commencement of the action, eight years' rent had become, and still was, due and owing, in arrear and unpaid to the plaintiff; that the aggregate value of such rent, upon the whole lot, was $153.12, and the fair and just proportion chargeable upon the defendant was $69.19, for which amount, with interest, the plaintiff claimed judgment. The defendant demurred to the complaint, and assigned for cause of demurrer, that it did not state facts sufficient to constitute a cause of action. The issue thus joined having been brought to trial, at a special term held at Albany, in October, 1855, before Mr. Justice WRIGHT, the demurrer was overruled and judgment rendered for the plaintiff. From this order the defendant appealed to the general term.

C. M. Jenkins, for the plaintiff.

A. Bingham, for the defendant.

By the Court, HARRIS, J. There is a *dictum* by Lord Holt, in *Brewster* v. *Kitchel*, (1 *Salk.* 198,) that where the owner of land has granted a rent charge, with a covenant to pay, an action of covenant will not lie merely against one as assignee of the land. The same case is reported in various other places, and among others in 12 *Mod.* and 1 *Ld. Raym.* 317; and it there appears that the three other judges who were associated with the chief justice, dissented from that opinion. Since that time, much learning has been expended, sometimes to little purpose,

in endeavoring to define the boundary between real covenants, or such as run with the land, and those which are merely personal. A most elaborate effort to accomplish this end was made by Mr. Justice Cowen, in *Norman* v. *Wells*, (17 *Wend.* 145,) and yet, after all his researches, that indefatigable judge was forced to declare that the authorities still left the application of old principles to new cases, a very nice exercise of the mind, and remaining, in greater degree, a matter for judicial discretion, than almost any other of equal importance in the law of property.

But from the time of Lord Holt until now, I am not aware that it has ever been doubted that a covenant for the payment of rent, whether it be made by the grantee of lands in fee, reserving rent to the grantor, or by a lessee for a term, belongs to that class of covenants which are annexed to and run with the land. The very definition of rent is, that it is a *certain profit* issuing yearly out of land. (2 *Bl. Com.* 41.) The land itself is the principal debtor. The covenant to pay the rent is the incident. It follows the land upon which it is chargeable, into the hands of the assignee, as necessarily as the principal itself. *Transit terra cum onere.* The assignee takes the land with all the advantage to be derived from the covenants of the grantor concerning the land, and he assumes all the burdens resulting from the covenants of the grantee.

It is true, that in order to make a covenant run with the land, it is not enough that it concerns the land. There must also be a privity of estate between the covenanting parties. The fallacy of the argument in support of the demurrer, lies in the position assumed by the defendant's counsel, that there must be not only privity of estate between the covenanting parties, but also between the plaintiff and the defendant. It was insisted that, in order to sustain the action against an assignee, the plaintiff must still have some reversionary interest in the land, as in the case of landlord and tenant. But this is not requisite. It is enough that, at the time of making the covenant, an estate passed between the covenanting parties. It is this alone which constitutes the privity between vendor and

purchaser, and carries the covenants of assurance and warranty of title to the purchaser. It was for the want of this privity that it was held, in *Webb* v. *Russell*, (3 *T. R.* 393,) that a covenant to pay rent to a stranger did not run with the land, so as to make the assignee liable.

In the case at bar, the grantor reserved to himself an annual profit issuing out of the land, of ten bushels of wheat, and with it a covenant obligatory upon the grantee and all who should succeed to his interest in the land, that this should be paid. When the defendant took his title to the land, he took it charged with the burden which the original grantee had thus inseparably annexed to it. By taking the benefit of the grant, he voluntarily assumed the liabilities of the original grantee in respect to the subject of the grant. Nor is the defendant the less liable because he is the assignee of only a part of the thing to which the covenant is annexed. "Covenants," said Wilmot, Ch. J., in *Bally* v. *Wells*, (cited by Cowen, J., in *Norman* v. *Wells*,) "which run and rest with the land, lie for or against an assignee at the common law, though not named. They stick so fast to the thing on which they wait, that they follow every particle of it." (*See Van Rensselaer* v. *Bradley*, 3 *Denio*, 135; *Same* v. *Gallup*, 5 *id.* 454.)

Again, it is insisted that it is not sufficiently alleged in the complaint, that the plaintiff is the assignee of the covenant upon which it is sought to make the defendant liable. The allegations are, that the grantor and covenantee, Stephen Van Rensselaer, died in January, 1839, seised of the rent in question; that by his will, duly executed and proved, he devised this rent to William P. Van Rensselaer, whereupon and whereby he became seised of the rent; and that on the 25th of September, 1848, William P. Van Rensselaer conveyed the rent to Andrew White and two other persons, and these again conveyed the rent, and all arrears of rent, to the plaintiff. Thus the plaintiff shows a state of facts which, in respect to the rent that had accrued and was unpaid at the time of the conveyance to him, entitled him to maintain the suit as assignee of a chose in action; and in respect to the rent subsequently accruing

and to become due, as the assignee of the unbroken covenant, which was an incident to the rent itself, I think the allegation of the facts constituting the plaintiff an assignee of the rent, was a sufficient allegation that the plaintiff was the assignee of the covenant for its payment.

Nor can I agree with the defendant's counsel in supposing the complaint defective in omitting to allege that after the plaintiff became assignee of the rent, he continued to be such owner until the suit was commenced. In the absence of any allegation to the contrary, this is a legal presumption, and need not be alleged or proved.

The defendant's counsel is also mistaken in his position that the only averment in the complaint as to the ownership of the defendant is, that all the estate of the grantee in the part of the premises mentioned, came to the defendant before the 1st of January, 1848. There is a further allegation, that the rent claimed accrued and became due after the defendant became, and *while he was* assignee as aforesaid. This is clearly sufficient. Nor can the objection that the owners of the other parts of the lot should have been made parties be sustained. By the partition of the land, as has recently been decided, (*see Van Rensselaer* v. *Chadwick*, *ante*, 333,) each owner became severally and independently liable for his proportionate share of the rent. There is no longer any community of interest between them. If one owner should pay more than his share, it would not enure to the benefit of another owner of a separate share, nor would the payment of less than his share, by any one owner, increase the liability of another. I think the order of the special term should be affirmed

[ALBANY GENERAL TERM, December 3, 1855. *Wright*, *Harris* and *Watson*, Justices.]

The Exchange Bank *vs.* Monteath and others.

24 371
26a 509

Where drafts were drawn by J. & M., the general agents at Albany, of a line of tow boats, upon H., the agent of the line in New York, at the request and for the accommodation of the Canal Bank, and signed by J. & M. as "Agents of the Tow Boat Company," payable to their own order and indorsed by them as agents, and subsequently discounted by the plaintiff, at the request of the Canal Bank, for a valuable consideration; *it was held*, in an action against the tow boat company, that the plaintiff, being apprised, by the drafts themselves, that they were drawn by agents, took them at the risk of showing, affirmatively, that the agents not only had the *apparent* authority to make the drafts, but also that the same were actually made for the benefit of the defendants, their principals.

MOTION for a new trial. The action was brought to recover the amount of three drafts drawn by Joy & Monteath, as agents of the defendants, upon Alfred Hoyt, another agent, together amounting to $9500. The drafts were drawn at the request of the cashier of the Canal Bank of Albany, and for the accommodation of that bank. The plaintiffs discounted the drafts upon the application of the cashier of the Canal Bank. For a further statement of the facts in the case, see 17 *Barb.* 171. The new trial which had been ordered was had at the Albany circuit, in October, 1854, before Mr. Justice Harris. The testimony being closed, the counsel for the defendants moved for a nonsuit, upon the ground that Joy & Monteath had exceeded their authority in drawing drafts for the benefit and accommodation of the Canal Bank, and that the drafts appearing upon their face to have been drawn by procuration, the plaintiffs were chargeable with knowledge of the agents' want of authority, and could not claim protection as *bona fide* holders. The judge denied the motion for a nonsuit, and directed a verdict for the plaintiff for $14,248.79, the amount of the drafts, with interest. To these decisions the counsel for the defendants excepted. An order was made that the motion for a new trial, upon the exceptions, be heard in the first instance at the general term, and that the entry of judgment be stayed until such hearing.

J. H. Reynolds, for the plaintiff.

J. K. Porter, for the defendants.

By the Court, HARRIS, J. When this case was before us on the former application for a new trial, I was unable to find any thing to distinguish it from the case of *The North River Bank* v. *Aymar*, (3 *Hill*, 262.) Upon a re-examination, I still think the two cases involve precisely the same question. In the latter case, Pexcel Fowler had executed a power of attorney authorizing his brother Jacob D. Fowler "to indorse any promissory note or notes, bills of exchange, or drafts, to accept all bills of exchange or drafts, or, in his name, to draw any note or notes." In the case under consideration, the drafts were drawn in the same form in which for several years the agents had been in the habit of drawing drafts in the business of the defendants. Such drafts had been discounted by the Canal Bank, and, on several occasions, had been re-discounted by the plaintiffs. In *The North River Bank* v. *Aymar*, the notes were made and indorsed by the attorney, for the accommodation of David Rodgers & Son, who passed them to the plaintiffs. In this case the drafts were drawn by the agent, for the accommodation of the Canal Bank, whose cashier procured them to be discounted by the plaintiffs. It appeared upon the face of the paper in both cases, that it was the act of an agent. In each case, the act was within the *apparent* scope of the agent's authority. In neither case was there evidence sufficient to warrant a jury in finding that the plaintiffs had not acted in good faith. I have taken the pains to refer to the record in the case of *The North River Bank* v. *Aymar*, from which it appears that upon the trial, which was had before Chief Justice Oakley, it was held that "it being asserted or shown that the notes were not made or indorsed in the business, or for the benefit of Pexcel Fowler, but for the benefit of D. Rodgers & Son, and that Jacob D. Fowler, in signing and indorsing the same, was not acting within the general scope of his authority, Pexcel Fowler was not bound thereby, and no recovery could be had thereon against the defendants as his executors. The decision upon the trial was sustained by the superior court, but upon error to the supreme court it was reversed, after being twice argued, as appears from the report of *Stainer* v. *Tysen*, (3 *Hill*, 279,) and by a divided court.

The doctrine of the majority, as declared by Cowen, J., was, that though, as against his principal, the agent exceeded his authority, yet, as the agent had been clothed with authority to issue such paper, it could not be impeached in the hands of a *bona fide* holder. On the contrary, it was maintained by Nelson, Ch. J., in a dissenting opinion, that being apprised, by the notes themselves, that they had been signed by an attorney, they were received by the plaintiffs under the hazard of showing that they had been made and negotiated within the precise limit of his authority. With this case before us, presenting a deliberate and unreversed adjudication of the precise point involved, the duty of this court, whatever may have been its own views of the question upon its merits, was entirely plain. Accordingly, when pronouncing the decision of the court granting a new trial in this case, when it was before under consideration, I did not hesitate to say that I regarded the case of *The North River Bank* v. *Aymar*, as directly in point and decisive of the question. I still think it should be so regarded. But, since the former decision, it has been discovered that the case of *The North River Bank* was, upon error brought to the court for the correction of errors, reversed. No report of the decision has been published, but it is obvious, I think, that the court of last resort must have adopted the view of the question maintained in the dissenting opinion of Ch. J. Nelson. There was no other question before the court. The judgment of the supreme court could not have been reversed, except upon the ground that before the plaintiffs in the action could recover, it was necessary for them to prove that the power of attorney, upon its face, authorized the agent to sign and indorse notes for his principal, and also, that *the notes were, in fact, made and indorsed in the business of the principal, or for his benefit.* The application of this doctrine to the case in hand, would require us to hold that the plaintiffs took the drafts in question at the risk of showing, affirmatively, that the agents not only had the *apparent* authority to make the drafts, but also that they were actually made for the benefit of the defendant.

Since this case was argued, a kindred question has been before the court of appeals, in the case of *The Mechanics' Bank of New York* v. *The New York and New Haven R. R. Co* In that case, Schuyler, the transfer agent of the defendants, had illegally and fraudulently issued and delivered to one Kyle a certificate for 85 shares of stock in the defendants' corporation. This stock had been pledged to the plaintiffs in the action, by Kyle, as security for money loaned. It was conceded that in the hands of Kyle the certificate was void, and it was held by the court of appeals that it was equally void in the hands of the plaintiffs, although received by them in good faith. The unanimous judgment of the court was pronounced by Judge Comstock. It is characterized by great clearness and strength of argument. In referring to the decision of the supreme court, in the case of *The North River Bank* v. *Aymar*, and its reversal by the court of errors, the learned judge says: "If the reversal proceeded, as I suppose it must, upon a doctrine directly opposite to that held by the supreme court, then the case certainly suggests a limit of great importance to the liability of principals, the recognition of which would be decisive of the present controversy" After noticing several recent English decisions, where it has been held that though the act of the agent *appeared* to be strictly within his power, the principal was not liable because it was not so in fact, he adds that "it is obvious that an agent may clothe his act with all the *indicia* of authority, and yet the act itself not be within the real or apparent power. The appearance of the *power* is one thing, and for that the principal is responsible. The appearance of the *act* is another, and for that, if responsible, I think the remedy is against the agent only. The fundamental proposition is, that one man can be bound only by the authorized acts of another. He cannot be charged because another holds a commission from him, and falsely asserts that his acts are within it."

The history of this action has been quite remarkable. It has been pending nearly eight years. When it was *first* tried, it was submitted to a jury who were unable to agree upon a verdict. Upon the *second* trial, a juror was withdrawn. The

third trial resulted in a nonsuit. That nonsuit was set aside and a new trial ordered, for the reasons stated in the report of the case in 17 *Barb.* 176. A *fourth* trial was had, when the court directed a verdict for the plaintiffs. Now, in consequence of the discovery of the fact that the decision of the supreme court, which seemed to settle the law of this case, had been reversed, we are obliged to recall our own decision and sustain the ruling of Mr. Justice WRIGHT, upon the third trial. As neither party can now expect to derive any advantage from further litigation in this court, it is to be hoped that, by consent of the parties, such a form may be given to the record as will enable them, without further delay or expense, to take the judgment of the court of appeals upon the important question which the case presents. It only remains for this court to declare that a new trial must be awarded.

[ALBANY GENERAL TERM, December 3, 1855. *Wright*, *Harris* and *Watson*, Justices.]

DEGROFF *vs.* THE AMERICAN LINEN THREAD COMPANY.

24 375
15b 551
21a 124

The defendants, a manufacturing corporation, having a store of goods, agreed with the plaintiff to sell the same to him for a specified sum, a part of which was to be paid in cash, and the remainder in six, nine and twelve months, with interest. It was also agreed that if the trustees of the defendants, then in office, should, within a specified time, cease to have the management of the affairs of the defendants, and, by reason thereof, the general trade of the hands in the employ of the company should be diverted from the plaintiff's store, and the plaintiff should sustain damage thereby, the defendants should pay him the sum of $300, or discount that amount from any sum the plaintiff might owe the defendants. At the time of making this agreement, the affairs of the defendants were managed by a board of five trustees. Soon afterwards three of the trustees resigned, and other persons were appointed in their places; one of whom was a merchant occupying a store adjoining that of the plaintiff, and who became the treasurer of the defendants. After his appointment, much of the trade of the hands in the defendants' employ went to his store. In an action to recover the $300 mentioned in the agreement, the

plaintiff alleged that a majority of the trustees in office when he made his purchase, had ceased to have the management of the affairs of the company, and that by reason thereof the general trade of the hands in the employ of the company had been diverted from his store, and that he had thereby sustained damage.

Held that the agreement was valid and binding; and that it should have been submitted to the jury to determine whether the general trade of the hands had been diverted from the plaintiff's store; and if it had, then whether such diversion had taken place in consequence of the change in the board of trustees, and whether the plaintiff had sustained damage thereby. And that if the verdict were in favor of the plaintiff on all of these questions, he would be entitled to recover the amount claimed as a deduction from the price of the goods.

MOTION for a new trial. The defendants are a manufacturing corporation, organized for the purpose of manufacturing linen goods, &c. Having a store of goods which they had been engaged in retailing to customers, and particularly to those employed in their manufacturing establishment, on the 29th of January, 1853, they agreed with the plaintiff to sell out to him their entire stock in trade, for $3445, of which $1000 was to be paid in cash, and the remainder in six, nine and twelve months, with interest. Negotiable notes were to be given for these payments, secured by mortgage. It was also agreed, that if the trustees of the defendants, then in office, should, within one year from the 1st of March then next, cease to have the management of the affairs of the defendants, and, by reason thereof, the general trade of the hands in the employ of the company should be diverted from the plaintiff's store, and the plaintiff should sustain damage thereby, the defendants should pay the plaintiff the sum of $300, or discount that amount from any sum the plaintiff might owe the defendants.

The sale was consummated about the 1st of March, 1853. The goods were delivered to the plaintiff. The cash payment of $1000 was made. The notes and security for the balance were executed and delivered, and an agreement to the effect above stated, on the part of the defendants, was signed by three of their trustees. The affairs of the defendants were managed by a board of five trustees. On the 28th of April,

three of the trustees resigned, and other persons were appointed in their place. In August following, this action was brought, to recover the $300 mentioned in the agreement made with the plaintiff by the defendants. The plaintiff alleged that a *majority* of the trustees in office when he made his purchase, had ceased to have the management of the affairs of the company, and that, by reason thereof, the general trade of the hands in the employ of the company had been diverted from his store, and that he had thereby sustained damage. It was further alleged, that the defendants had refused to pay the $300 mentioned in their agreement, or to discount that amount from any sum or sums which the plaintiff owed the defendants. The answer of the defendants was a general denial of the allegations in the complaint. The cause was tried at the Saratoga circuit, in June, 1855, before Mr. Justice JAMES. On the trial, the plaintiff proved the transaction, substantially as set forth in the complaint; that at the time he purchased the goods the defendants had in their employ about 100 hands; that three of the trustees resigned in April, and among the new trustees appointed, was Abiram Fellows, who was a merchant occupying a store adjoining to that of the plaintiff; that Fellows became the treasurer of the defendants, and after that, much of the trade of the hands in the defendants' employ went to his store.

The plaintiff having rested, the defendants moved for a nonsuit. The principal grounds upon which the motion was founded were, 1. That the plaintiff had proved that but three out of the five trustees had ceased to have the management of the defendants' affairs. 2. That it had not been proved that the *general trade* of the hands had been diverted from the plaintiff's store in *consequence* of the resignation of the three trustees and the election of three others in their stead, or that such trade had been diverted at all. 3. That the defendants had not the capacity to make such a contract as that upon which the action is founded. 4. That the trustees, if they had power to sell the goods, had not the power to sell them with a condition that they should be retained in office beyond the period for which they were elected, and subjecting the defendants to dam-

age if they should not be so continued. 5. That the agreement upon which the plaintiff sought to recover, was void as against public policy. The court decided that, under the evidence and pleadings, the plaintiff was not entitled to recover, and directed a nonsuit to be entered. An order was made that the motion for a new trial, upon exceptions, be heard, in the first instance at a general term.

E. F. Bullard, for the plaintiff.

D. Wright, for the defendants.

By the Court, HARRIS, J. The agreement upon which this action is brought, is to be treated as a part of the contract for the sale of the defendants' stock in trade to the plaintiff. One inducement for the plaintiff to make the purchase, obviously was, that he might thereby secure the custom and patronage of the defendants' establishment. He was willing to have the price depend upon this contingency. If he could have the benefit of the trade he sought, he could afford to pay a larger price for the goods. He accordingly agreed to pay $300 more in the one case than in the other, and the defendants stipulated that, as the plaintiff had paid and secured the whole amount, they would refund the $300, or give him credit therefor, if the contingency contemplated by the agreement should happen. To the validity of such an agreement I can perceive no objection.

The condition upon which the $300 was to be refunded or credited to the plaintiff was, not only that he should lose the general trade of the hands in the employ of the defendants, but that he should lose it by reason of a change in the administration of the affairs of the company. Upon this question the plaintiff gave some evidence—enough, I think, to carry the case to the jury. It should have been submitted to them to determine, whether the general trade of the hands had been diverted from the plaintiff's store, and if it had, then, whether such diversion had taken place in consequence of the change in the board of trustees, and whether the plaintiff had sustained damage

thereby. If the verdict of the jury had been in favor of the plaintiff upon all these questions, as I think it might have been, I do not see why the plaintiff should not have recovered the amount claimed as a deduction from the price of the goods.

The defendants are not in a position to shield themselves from liability upon their contract, upon the ground that they had transcended their corporate power by engaging in the purchase and sale of goods. It may be that they had, but if so, having entered into the contract with the plaintiff and received from him the consideration for the goods, they are not at liberty now to repudiate that portion of the contract which imposes an obligation upon them. (*See Steam Nav. Co.* v. *Weed*, 17 *Barb.* 378, *and cases there cited.*) I am of opinion that a new trial should be granted.(*a.*)

[Albany General Term, December 3, 1855. *Wright*, *Harris* and *Watson*, Justices.]

(*a*) This case has since been decided the other way, in the 4th District.

Filkins *vs.* Whyland.

Where, upon the sale and purchase of a horse, a bill of sale was executed by the vendor, specifying the price and acknowledging its receipt, *it was held* that the instrument was to be construed as being a mere receipt for the purchase money, and not as a contract, whose written terms could not be varied by parol; and that parol evidence of a verbal warranty was therefore admissible.

21 379
41 437
21a 238

THIS was an appeal from a judgment of the Troy mayor's court. The action was brought to recover damages for the breach of a warranty upon the sale of a horse. Upon the trial, the plaintiff gave evidence to prove the purchase of a horse of the defendant by him; that the defendant warranted the horse to be sound, and a breach of the warranty. The defendant proved that when the horse was purchased and paid for by the plaintiff, an instrument in writing was executed and delivered to the plaintiff, as follows:

"Troy, Nov. 19, '52.

C. B. Filkins, Bo't of C. Whyland one horse, $150.

Received payment, C. WHYLAND."

The counsel for the defendant thereupon moved for a nonsuit, on the ground that the contract of sale being in writing and containing no warranty, it was not competent to prove such warranty by parol evidence. The court so decided, and granted the motion for a nonsuit. The plaintiff excepted to the decision, and judgment having been perfected against him, he appealed to this court.

W. A. Beach, for the plaintiff.

A. B. Olin, for the defendant.

By the Court, HARRIS, J. I regard the instrument executed at the time of the sale, as a mere receipt. It acknowledges that the plaintiff has paid the purchase money upon the sale of a horse, and nothing more. It contains no agreement, stipulation or condition which characterizes a contract whose written terms cannot be varied by parol. The two things are entirely independent of each other. The writing is evidence to them that the plaintiff had purchased the horse and had paid a certain price for him. The parol evidence is given to show a contract touching the horse, it is true, but relating to a matter having no necessary connection with the sale of the horse or payment of the price.

Nor is the question without authorities, expressly in point. In *Hersom* v. *Henderson* (1 *Foster*, 224,) the action was assumpsit for a breach of warranty on the sale of horses. The defendant proved a bill of sale, in which the horses were described and their ages stated, and the receipt of the price acknowledged. The plaintiff proved by parol evidence, that at the time of the sale the defendant warranted the horses to be sound. It was held, upon the trial, that the writing must be presumed to contain the contract between the parties, and that

parol evidence was not admissible to prove a contract of warranty not contained in the writing. But the supreme court of New Hampshire, Gilchrist Ch. J. delivering the opinion, reversed the decision, holding that the evidence was competent. So, in *Allen* v. *Pink*, (4 *M. & Welsb.* 140,) where, upon the purchase of a horse, a memorandum of the sale had been given, it was held that parol evidence of a verbal warranty was admissible. Lord Abinger said, "the paper appears to have been meant as a memorandum of the transaction, or an informal receipt of the money, and not as containing the terms of the contract itself."

Even if the writing is to be regarded as a contract for the sale of the horse, it is competent to show that at the same time a parol contract was made collateral to, and distinct from that which was reduced to writing. (3 *Starkie's Ev.* 1049.) Thus, in *Jeffrey* v. *Walton*, (1 *Starkie's R.* 267,) an action was brought for not taking proper care of a horse which had been let by the plaintiff to the defendant; parol evidence was given to show the liability of the defendant. For the defense, it was shown that a memorandum in writing was executed at the time the horse was hired, in the following words: "Six weeks at two guineas, William Walton, jr." It was insisted, on the part of the defendant, that this writing was to be considered as the real contract between the parties, and that it was not competent for the plaintiff to engraft upon it a further term by means of parol evidence. But Lord Ellenborough said "The written agreement merely regulates the time of hiring and the rate of payment. I shall not allow any evidence to be given by the plaintiff in contradiction of these terms, but I am of opinion, that it is competent for the plaintiff to give in evidence supplemental matter, as part of the agreement."

Whether, therefore, the writing is to be regarded as a mere receipt or as the evidence of a contract, I think it was competent for the plaintiff to prove, that at the time the purchase was made, the defendant also agreed to warrant the soundness of the horse. It neither varies nor adds any thing to, the

written instrument. The judgment of the mayor's court should therefore be reversed, and a new trial granted, with costs to abide the event.

[Albany General Term, March 3, 1856. *Harris*, *Watson* and *Gould*, Justices.]

21 382
48 66
5L 478
24a 278
27a 560

Foy *vs.* The Troy and Boston Rail Road Company.

Where a rail road company receives, for transportation, property addressed to a person at a point beyond the terminus of its road, it will be understood, in the absence of any proof to the contrary, to have agreed to deliver the property, in the same order and condition in which it was received, to the consignee.

It is not the duty of the owner, in case of injury or damage to the property, to inquire how many different corporations make up the entire line of road between the place of shipment and the place of delivery; or, having ascertained this, to determine, at his peril, which of such corporations has been guilty of the negligence which occasioned the injury.

If a rail road company receiving freight for transportation, intends to limit its liability to injuries occurring upon its own road, it should provide for such limitation, in its contract.

Since the decision of the court of appeals, in *McKee* v. *Judd*, (2 *Kern.* 622,) all demands arising from injuries to property are assignable; and when assigned, the action is properly brought in the name of the assignee.

THIS was an appeal from a judgment of the Rensselaer county court, affirming a judgment of the Troy justice's court. The plaintiff alleged in his complaint, that the defendants were common carriers, and, as such, on or about the 1st day of February, 1853, by their agents, contracted with one Patrick Foy to safely carry a certain wagon then belonging to said Patrick Foy from Troy to Burlington; that the wagon was placed on the defendants' cars and consigned to A. McCan, of Burlington, but that the defendants did not safely convey the wagon, but the same was broken and became worthless while in the charge of the defendants, to the great damage of the plaintiff, to whom, before the com-

mencement of the action, Patrick Foy for a valuable consideration, sold and assigned the wagon, and all claims and demands and causes of action which he had against the defendants for damages and injury to, and the non-delivery of the wagon. The defendants denied the allegations in the complaint. On the trial, the plaintiff proved the allegations in the complaint. A witness testified that the wagon was in good condition when put upon the defendants' cars at Troy; that he had since seen the wagon at the freight depot at Burlington; that its shafts and reaches were broken and one of its wheels was entirely broken down. When the plaintiff rested, the defendants moved for a non-suit, on the ground that there was no sale of the property; also, that the property never was demanded; and that there was no proof of negligence on the part of the defendants. The motion was granted. From this judgment the plaintiff appealed to the county court, where the judgment was affirmed.

R. A. Parmenter, for the plaintiff.

A. B. Olin, for the defendants.

By the Court, HARRIS, J. At the time this cause was decided in the courts below, there was a conflict of opinion in this court upon the question whether a cause of action for an injury to personal property was assignable, so as to vest in the assignee a right of action. It is probable that the justice's court maintained the negative of this question and granted the motion for a nonsuit upon that ground, and that the county court concurred in that view. But that question has since been settled by the decision of the court of appeals in *McKee* v. *Judd*, (2 *Kern.* 622.) The doctrine of that case is, that all demands arising from injuries to property are assignable, and when assigned, the action is properly brought in the name of the assignee.

The only point upon which the counsel for the defendants relied, upon the argument, was, that the defendants were only carriers from Troy to Eagle Bridge, the *terminus* of their road.

But a sufficient answer to this position is, that the wagon was to be carried to Burlington. It was consigned to a person residing there. Having been received by the defendants, thus addressed and consigned, they must be understood, in the absence of any proof to the contrary, to have agreed to deliver it, in the same order and condition in which it was received, to the consignee. It was no part of the plaintiff's business to inquire how many different corporations made up the entire line of road between Troy and Burlington; or, having ascertained this, to determine at his peril, which of such corporations had been guilty of the negligence which resulted in the injury to his wagon. He made his contract with the defendants. They agreed to deliver his wagon safely at Burlington. Whether they were to carry it upon their own, or the road of some other corporation, was a question which did not concern the plaintiff. If the defendants had thought fit to limit their liability to injuries occurring upon their own road, they should have provided for such limitation in their contract. I am of opinion that the judgment of the county court and that of the justice's court should be reversed.

[Albany General Term, March 3, 1856. *Harris*, *Watson* and *Gould*, Justices.]

Fowler *vs.* Dorlon and others.

The loss of the goods of a guest, while at an inn, is presumptive evidence of negligence on the part of the innkeeper. Upon this presumption he is *prima facie* liable. But he can repel it by showing that the loss is attributable to the personal negligence of the guest himself.

Gross negligence need not be shown. It is enough to exonerate the innkeeper, if the guest has, by his own neglect or imprudence, exposed his goods to peril.

In an action against an innkeeper, to recover for the loss of money contained in a valise, the defendant has a right to have the jury instructed, in reference to the plaintiff's conduct at the time of the loss, that if they are of opinion that

in concealing the fact that the valise contained money, and treating it as mere baggage, he was guilty of gross negligence, the defendant was exonerated from liability.

MOTION for a new trial. The action was brought against the defendants as innkeepers, to recover the value of a valise and contents, belonging to one Stephen Barker. The cause of action had been assigned by Barker to the plaintiff. The action was tried at the Rensselaer circuit, before Mr. Justice WRIGHT. Upon the trial, it appeared that the defendants had for many years been the proprietors of a hotel in the city of Troy, known as the Mansion House, and that Barker, when visiting Troy, had been in the habit of stopping at this hotel. He resided in the county of Washington. On the morning of the 27th of June, 1852, he arrived at Troy, from the west. Upon leaving Rochester, the evening before, he had placed his valise in the baggage car and received for it a check. The valise, besides some wearing apparel, contained $2000 in bank bills. As the cars passed down River street, in Troy, they stopped in front of the Mansion House, and Barker there got out. He handed the check to Calvin Blake, whom he met there, with a request, as Blake testified, that he should get out his valise for him. Barker testified that he did not recollect whether he said any thing to Blake at the time. Blake received the valise from the baggage master and placed it upon the sidewalk. Barker testified that when he saw Blake approaching him he turned and went to the mansion house. Blake testified that Barker stood facing him when he set down the valise. Barker, without observing what had been done with his valise, proceeded to the Mansion House, where he, after a few minutes, asked for a room, and upon being asked what baggage he had, then, for the first time, missed his valise. It had been stolen. Blake, at the time, was in the employ of the proprietors of a line of stages running between Troy and Bennington, as an agent and runner. The office of this line of stages was kept in the room occupied as the office of the hotel. Blake boarded at the Mansion House, and, with the knowledge of its proprietors, had been in the habit of soliciting guests for

the house. Barker testified that just as he turned to go to the Mansion House, the cars started on. Blake having deposited the valise upon the walk, stepped upon the platform of one of the cars and went on with the train, for the purpose of procuring passengers for his line of stages.

The judge charged the jury that the primary question to be determined upon the proof was, whether or not, at the time of the loss of the valise, the relation of innkeeper and guest existed between the defendants and Barker: that if, at that time, Blake was in the actual employment of the defendants, or if, though not actually in such employment, he was acting there with the knowledge and approbation of the defendants, they were liable for his acts in that capacity, and the baggage received by him of Barker, was within the custody of the defendants as innkeepers. That if the jury should find that Blake was in fact the servant of the defendants, or that the defendants were to be regarded as his masters or principals, then they were to inquire further, whether Barker was guilty of gross negligence in his control and disposition of the property claimed to be lost; that if they should find that he was, the defendants would not be liable, though they should be satisfied from the evidence, that the relation of innkeeper and guest, as between Barker and the defendants, had been assumed, and existed at the time the property was lost.

The counsel for the defendants asked the court to charge the jury that an innkeeper is not responsible for a large sum of money of his guest, contained in his baggage, when the guest neglects or omits to inform the innkeeper of the fact that the baggage contains money. The court refused so to charge, and the defendants' counsel excepted. The defendants' counsel also asked the court to charge the jury, that if they should find that Barker was guilty of gross negligence, either in not disclosing to Blake the fact that the valise contained money, or in treating it as mere baggage, at the time it was taken from the cars, the loss must be his, and the defendants were not liable. The court declined so to charge, but charged the jury that a guest was not bound to inform the innkeeper of the con-

rents of his baggage to enforce a liability against the latter for its loss, although a guest may be bound to the exercise of ordinary care and diligence in the control and preservation of his baggage. The counsel for the defendants excepted. The jury rendered a verdict in favor of the plaintiff for $2050. The court thereupon directed the exceptions to be heard, in the first instance, at a general term.

W. A. Beach, for the plaintiff.

D. L. Seymour, for the defendants.

HARRIS, J. The judge at the circuit was right when he instructed the jury that the primary question in this case was whether at the time the valise was lost, the relation of innkeeper and guest existed between Barker and the defendants. But, upon this question, I am inclined to think there was not sufficient evidence to require that it should be submitted to the jury. If Barker intended, when he left the cars, to make himself the guest of the defendants, such purpose was concealed within his own breast. He neither said nor did any thing to evince such intention. He handed his check to Blake; but this at most was an equivocal act. It might have been, as Blake seems to have understood it, that he might do him the service to receive for him his valise from the baggage master. It might have been because he knew that Blake was the agent of the Bennington stages, and he intended to become a passenger; or, it might have been because he thought Blake was also in the employ of the defendants, and he intended to become their guest. Whatever his purpose, it had not yet been indicated. How then can it be said that the mere act of delivering his check to Blake, and the request that he should get out his valise for him, is sufficient evidence to warrant the jury in finding that then, and before he entered the defendants' house, or gave directions that his baggage should be taken there, the relation of guest and innkeeper was created between Barker and the defendants? But as there was no motion for a nonsuit,

and this case is heard in the first instance at the general term a new trial cannot be granted because the verdict is against evidence.

The judge charged the jury that if Blake was in the actual employment of the defendants, or, though not in their actual employment, if he was acting with the knowledge and approbation of the defendants, in such a manner as to induce the guests of the defendants to believe that he was their servant, they were liable for his acts, and the baggage received by him of Barker was within the custody of the defendants as innkeepers. Upon this branch of the case, I think the judge should have gone further, and should have submitted to the jury the distinct question whether Blake received the baggage as the servant of the defendants. As the charge stands, in the case, this fact seems to have been assumed. But there are no exceptions to the charge, and therefore, upon this application, this defect is not available to the defendants.

The judge further charged the jury, that if they should find that Blake was in fact the servant of the defendants, or that the defendants were to be regarded as his principals, they were next to inquire whether Barker was guilty of gross negligence in his control and disposition of the property claimed to be lost. Here, too, I think the case was presented to the jury too strongly against the defendants. The loss of the goods of a guest while at an inn, is presumptive evidence of negligence on the part of the innkeeper. Upon this presumption he is *prima facie* liable; but he can repel it by showing that the loss is attributable to the personal negligence of the guest himself. Gross negligence need not be shown. It is enough to exonerate the innkeeper, if the guest has, by his own neglect or imprudence, exposed his goods to peril. (*See Story on Bailments*, § 472.)

In *Armistead* v. *White*, (6 *Law and Eq. Rep.* 349,) the action was against an innkeeper, for money lost by a guest. Upon the trial, Platt, B., left it to the jury to determine, upon the evidence in the case, whether the plaintiff had by his *gross negligence* relieved the defendant from his liability. The de-

fendant had a verdict, and upon a motion for a new trial, Lord Campbell said: "It is questionable whether the direction was not too favorable for the plaintiff, because it is doubtful whether, in order to relieve the innkeeper from his liability, there must be *crassa negligentia* in the guest."

Here, again, the defendants seem to have acquiesced in the rule laid down by the court, for we find them not only omitting to except to the charge, but subsequently asking the court to charge that they were not liable if the jury should find that Barker had been guilty of *gross negligence*, either in not disclosing to Blake the fact that the valise contained money, or in treating it as mere baggage, at the time it was taken from the cars. But in the refusal thus to charge, I think there was error. It is true that the judge had already told the jury that if, in his control and disposition of his property, Barker had been guilty of gross negligence, the defendants were not liable; but now, when the defendants asked to have this principle applied to the conduct of Barker at the time the loss occurred, the judge declines so to instruct the jury. The proposition which they asked to have submitted to the jury was, in substance, that inasmuch as gross negligence on the part of Barker would exonerate the defendants from liability, the jury had the right to infer such negligence from the fact that Barker, at the time the valise was taken from the cars, not only concealed from Blake the fact that it contained money, but himself treated it as mere baggage. I agree with the learned judge, that Barker was not bound to disclose the fact that the valise contained money; but I think the jury might well have found, if they had understood that they were at liberty to consider the question, that the conduct of Barker was imprudent to such a degree as to amount to gross negligence. That he did not act with the ordinary caution of a prudent man, is very clear. If he thought it safe to carry so large an amount of money in the way this was carried, he might at least be expected, when the valise containing it should be taken from the baggage car, to keep his eye upon it until it should be deposited in the hotel. Or, if he thought fit to intrust a man in the situation of Blake, with so valuable

an article, it would seem but a reasonable exercise of prudence that he should at least request him to deliver it at the hotel without delay. Had he even done this, it is probable no loss would have occurred, for he would have learned from Blake that his business required him to proceed with the train, and thus would have been led to protect his valise for himself. Or, if he had ventured to leave it behind, it seems to me that no man of ordinary prudence would have failed, at least, to look after it, when he reached the house, and seeing it, as he probably would, lying, uncared for, in the street, would have immediately taken measures to secure it. It cannot be pretended that the circumstances, as they appear in the case, were not quite sufficient to justify a verdict finding that Baker was guilty of gross negligence.

It is true, the court, when asked to instruct the jury that if they should find from the conduct of Barker when the valise was taken from the baggage car, that he was chargeable with gross negligence, the defendants were not liable, stated the general proposition which had already been stated in the charge, that a guest is bound to the exercise of ordinary care and diligence in the control and preservation of his baggage; but I think the defendants had a right to have the jury instructed, in reference to the conduct of Barker upon the occasion when the loss occurred, that if they should be of opinion that in concealing the fact that the valise contained money, and treating it as mere baggage, he was guilty of gross negligence, the defendants were exonerated from liability. I am therefore of opinion that a new trial should be granted, with costs to abide the event.

Watson, J., concurred.

Gould, J. Fully acquiescing in the *general* grounds of the preceding opinion, I have had considerable difficulty in arriving at the conclusion that the judge at the circuit did not give the defendants the benefit of *all* that they distinctly and properly asked of him. And though I have had no doubt that Barker was, to say the very least, far from what I should call *prudent*, in his course as to so valuable a valise, I have hesitated as to

the power of the court to relieve the defendants in the shape in which their case comes up. In making requests, to found exceptions, at a trial, great precision should be used, to ask distinctly for what really is wanted, and for *that only;* as asking for *too much* vitiates a position, otherwise sound.

This case seems one in which the defendants should, in fairness, be allowed the full benefit of their *actual* legal rights, distinctly presented to both court and jury. And I agree in awarding a new trial.

ALBANY GENERAL TERM, March 3, 1856. *Harris, Watson* and *Gould*, Justices.]

LOCKWOOD and others *vs.* THORNE and others.

24 391
18a 285

Where T. & Co. rendered to L. & Co. an account of their mutual dealings, which contained a charge against the latter of $880.48, and showed a balance of $5623.41 due them, and L. & Co. soon afterwards drew a draft on T. & Co. for an amount corresponding with that balance, which was paid, and they suffered several months to elapse before bringing a suit to recover the item of $880 48 as improperly charged to them; *it was held*, that when L. and Co. drew for the balance of the account as sent to them they agreed to the correctness of the charges made in the account; and that from that time the transaction was closed, and they could only open it by proof of fraud or mistake.

Held also, that the fact that afterwards L. & Co. preferred a claim against T. & Co. for the amount of the disputed charge, could not avail the former firm. And that the fact that T. & Co. were willing to negotiate with L. & Co. for a settlement of the matter in controversy; or that in their dealings with others T. & Co. had been willing to treat other accounts, similarly situated, as open and unsettled, could not change the rights of the parties.

MOTION for a new trial. The action was brought to recover a balance claimed to be due the plaintiffs upon a contract with the defendants for tanning hides. The trial was had at the Ulster circuit in February, 1856, before Mr. Justice GOULD. The facts which appeared upon the trial were substantially the same as are stated in the report of the case in 1 *Kernan*, 170. (*See also same case in* 12 *Barb.* 487.)

Upon the trial the plaintiff offered to prove that soon after the draft of February 17, 1847, was drawn, the plaintiff Lockwood proceeded to New York and had an interview with the defendants, in which he stated that the plaintiffs objected specifically to the charge of deficiency of gain in weight, and told the defendants it could not be allowed; that the defendants then treated the matter as open between the parties upon that charge, and entered into a negotiation with the plaintiffs about it, and proposed to allow part of the amount to the plaintiffs, and neither then nor afterwards before the suit was brought, in any way claimed that the rendering of the account or the drawing of the draft, constituted any bar to the claim of the plaintiffs or any settlement between the parties. The plaintiffs also offered to show that on other occasions, subsequently, the defendants had negotiated with the plaintiffs for the settlement of the claim, treating it as an open and unsettled demand, and had offered to pay a part of it. The plaintiffs also offered to prove that in two instances, one in the year 1844 and the other in 1846, the defendants had charged other tanners in their annual account current with deficiency in gain of weight, and after the tanners had received such accounts and had drawn for the balance and the drafts had been paid by the defendants, the accounts were considered by the defendants as open and unsettled, though not disputed until several weeks afterwards.

All the testimony thus offered being objected to by the defendants was excluded by the court, upon the ground that the whole question had been decided by the court of appeals. The court accordingly held that the plaintiffs, by drawing for and receiving payment of the balance due, according to the account rendered by the defendants, without any accompanying claim or notice that the account was incorrect, concluded the plaintiffs from subsequently disputing the correctness of the account, and that evidence of a subsequent claim by the plaintiffs was inadmissible. To this decision the plaintiffs' counsel excepted. The court thereupon directed a nonsuit to be entered. The plaintiffs' counsel excepted, and upon a bill of exceptions moved for a new trial.

J. Parker, for the plaintiffs.

L. Tremain, for the defendants.

By the Court, HARRIS, J. When this case was before the court upon a former occasion, it was held that the mere fact that the plaintiffs had received payment of the amount which the defendants, by their account rendered, had admitted to be due, without then disputing the charge for deficiency of weight, was not sufficient to preclude a recovery for the amount of such charge, upon showing it to be erroneous. This decision was made by a divided court. It so happened, that when the cause found its way into the court of appeals, the judge who dissented in this court, was there to meet it. Nor was this all. It also happened that it fell to the lot of the same dissenting judge to pronounce the judgment of that court. This combination of casualties, such as perhaps never before befell an action, proved fatal to the plaintiff's right to recover. The learned judge, not forgetting his convictions upon the examination of the evidence in this court, took occasion to say, in his opinion, what he could not have learned from the case in the court of appeals, that the weight of evidence preponderated against the finding of the referees. It is not impossible that this view of the merits of the case may have had some influence in the determination of the legal question involved. Under these circumstances it was decided that the fact that within a few days after the plaintiffs received the account stated by the defendants they made their draft for the balance stated, "not a general draft in round figures," but a draft for the *precise balance*, furnished affirmative, and in the opinion of the judge who pronounced the decision, *conclusive* evidence that the plaintiffs had agreed to the account then before them as a *stated* account. It is appropriately added that "the transaction being an account stated, it is *conclusive* upon the parties, unless the plaintiffs show, affirmatively, fraud or mistake."

This, then, is the law of the case. When the plaintiffs, having before them the account, in which they were charged with the item which they now dispute, drew for the balance, they agreed

to the correctness of the charges made in the account. From that time the transaction was closed. The plaintiffs could only open it by proof of fraud or mistake. Of this there is no pretense. The fact that, afterwards, the plaintiffs preferred a claim against the defendants for the amount of the charge in question, cannot avail the plaintiffs. Nor can the fact that the defendants were willing to negotiate with the plaintiffs for a settlement of the matter in controversy, change the rights of the parties. Much less can the fact that, in their dealings with others the defendants have been willing to treat other accounts similarly situated as open and unsettled. Such evidence would not tend, in the slightest degree, to show either fraud or mistake in the settlement; and without this, we have seen that the parties must be held concluded.

I am satisfied that the plaintiffs never for a moment intended to submit to the charge made against them for deficiency of weight in the leather tanned for the defendants. I am equally satisfied that the defendants themselves did not so understand the transaction. The defendants, I have no doubt, were not less surprised than were the plaintiffs, to find themselves, by the decision of the court, made parties to an agreement which they were not conscious of having made. But however this may be, it is not within the legitimate power of this court to relieve the plaintiffs. If the learned judge whose views of the case prevailed in the court of appeals, and whose further fortune in the vicissitudes of legal affairs it has now become to act as counsel for the plaintiffs, has at length become satisfied of the justice of their claim, his only hope will be found, I apprehend, in an effort to induce the court, by whose decision we are controlled, to recall that decision, and to say that the plaintiffs, by receiving from the defendants what they admitted to be due and were willing to pay, did not preclude themselves from asserting and establishing, if they can, another claim against the defendants, the correctness of which had not been admitted. The motion for a new trial must be denied.

[Albany General Term, March 3, 1856. *Harris*, *Watson* and *Gould* Justices.]

JONES and others *vs.* DANA, receiver of the Utica Insurance Company.

24 395
27 71

Whatever a corporation would be obliged to prove, in an action brought by it, upon the issue of *nul tiel corporation*, may be controverted in an action brought against the corporation for relief based upon the corresponding allegation that no such corporation ever existed. Beyond this, the party contesting the corporate existence of the company cannot go.

All that a corporation is called upon to prove, to establish its existence, in a litigation with individuals dealing with it, is its charter, and user under it.

If a company has in form a charter authorizing it to act as a body corporate, and is in fact in the exercise of corporate powers at the time of taking a promissory note from an individual, it is, as to him and all third persons, a corporation *de facto*, and the validity of its corporate existence can only be tested by proceedings in behalf of the people.

Where parties have been induced to enter into contracts of insurance upon a fraudulent representation by the agents and officers of the company in regard to its capital, or pecuniary resources and ability, or any other matter which rightfully influenced them in the negotiation, they may be relieved against their contracts; but it not being necessary for their protection to go beyond that and declare the non-existence of the corporation, for any purpose, it should not be done.

If the plaintiffs, in such a case, have shown the corporation to be acting under a charter or an authority apparently valid, and really so unless impeached by something outside of the record evidence of its corporate existence and depending upon proof *aliunde*, and have thus furnished *prima facie* evidence of the incorporation, they cannot go behind that evidence, to show that the company was got up in fraud or mistake, or was irregularly brought into existence.

The determination of the commissioners appointed by the comptroller to make the necessary examination for that purpose, that an insurance company is in possession of the requisite capital and premium notes, is final, so far as the existence or non-existence of the corporation is concerned, until impeached and overthrown by a proceeding instituted by the people or their representatives, for that purpose.

The copies of the examiners' certificate and of the charter, when filed in the office of the county clerk, constitute the authority of the corporation to commence business and issue policies, and are the evidence of its right to act as a corporation. The courts, therefore, cannot, at the instance of third persons, go behind those acts and the prescribed evidence of them, for the purpose of determining as to the validity of the organization of the corporation.

A certificate of the examiners appointed by the comptroller, stating that the company has notes to the extent required by the 5th section of the statute, "given on application for insurance," is a substantial compliance with the 11th section of the statute

Jones *v.* Dana.

THIS action was brought by the above plaintiffs on behalf of themselves and all other makers of premium notes in the Utica Insurance Company, to set aside an assessment made by the receiver of said company, and for other relief. The first cause of action in the complaint alleged the following facts. That the plaintiffs were makers of premium notes in the Utica Insurance Company, a company organized as a mutual insurance company under the general act of 1849; that the company was never organized pursuant to the statute and never became a corporation, in that the persons appointed by the comptroller under the 11th section of the act, gave a certificate that the said company had notes to the extent required by the 5th section, "*given on applications for insurance*," instead of certifying that they had the necessary amount of notes given *on engagements for insurance*, as required by the act; that such a certificate was not what was required by the act, and that the company could not become a corporation until a certificate in accordance with the act had been given. It was further alleged in this first cause of action that there was also fraud in the organization of the company; that those persons who gave the certificate were imposed upon and deceived, and that the certificate was not true; that the company was not, at the time of obtaining this certificate, in possession of the amount of notes required by the act, and that notes upon which no agreements had ever been made for insurance at all, and which were only made to be used for the occasion and then to be delivered back, were placed before the persons appointed to make the certificate, and the certificate was made on them, the persons appointed by the comptroller being thus deceived and imposed upon; that there were several thousand dollars, in amount, of this description of notes, and that they were, immediately after obtaining said certificate, delivered back to the persons who made them; that these acts were a fraud on the *bona fide* members of the company, and rendered the organization void and of no effect. The relief prayed for under this cause of action was that the court should declare the Utica Insurance Company was never organized, and that the premium notes are void. To this cause of action the defendant

demurred, and specified the following as the ground of demurrer "That such pretended cause of action does not state facts sufficient to constitute a cause of action against this defendant, in that the pretended facts or the allegations setting up and alleging an illegal and fraudulent organization of said corporation are set up and alleged by and on behalf of the plaintiffs who are and were corporators in the said the Utica Insurance Company; whereas the same cannot so be set up, nor could or would said pretended facts or said allegations form any defense to the payment of the notes in the complaint mentioned." The issue thus raised was submitted on written arguments.

P. Gridley, for the plaintiffs.

W. B. Dana, for the defendant.

W. F. ALLEN, J. The demurrer is only to the first cause or ground of action alleged in the complaint, which is, that the Utica Insurance Company never became a valid corporation for any of the purposes of the organization, by reason of an omission on the part of the associates to comply with the precedent requirements of the statute; also by reason of an alleged fraud practiced upon the persons appointed by the comptroller to examine and ascertain whether the company was in possession of the engagements for insurance, to the full extent required by the act under which the company assumed to organize; and also by reason of an alleged defect and insufficiency in the certificate required to be given by the examiners, preliminary to the commencement of business by the corporation. The relief asked upon this branch of the case is that it be adjudged that the association was never organized as a mutual insurance company, and that the premium notes given upon insurance effected with the company are therefore void. I assume, as it is assumed by the defendant in terms by his demurrer, and by the argument of his counsel, that the plaintiffs did insure with the Utica Insurance Company after the commencement of its business upon the plan of mutual insurance, and gave their notes for

the premiums of their respective insurances, in whole or in part, and that such notes, upon the appointment of the defendant as receiver of the effects of the company, passed into his hands and are now held by him, and claimed to be valid against the several makers, to the full amounts thereof; that the plaintiffs were, in virtue of their insurances, members and corporators of the mutual insurance company, if any such company was in existence.

It may be assumed that whatever the alleged corporation would have to prove, in an action brought by it, upon the issue of *nul tiel corporation*, may be controverted in an action brought against the corporation for relief based upon the corresponding allegation that no such corporation ever existed, and I am of opinion that beyond this the party contesting the corporate existence of the company cannot go. All that the corporation is called upon to prove, to establish its existence, in a litigation with individuals dealing with it, is its charter and user under it. (*McFarlan* v. *The Triton Ins. Co.* 4 *Denio*, 392. *Utica Ins. Co.* v. *Tilman*, 1 *Wend.* 555.) In *The Fire Department of N. Y.* v. *Kip*, 10 *Wend.* 266.) Savage, Ch. J., says: "That the plaintiffs are a corporation, was proved by the production of the statute declaring them to be so. This case, in that respect, is different from those corporations created by statute, and to become entitled to corporate powers by something to be done *in futuro*. In such cases we have held that at least proof of user under the charter shall be produced." (*See also U. S. Bank* v. *Stearns*, 12 *Wend.* 314; *Williams* v. *Bank of Michigan*, 7 *Wend.* 539.) There is a class of cases reported in actions brought against corporators upon subscriptions to the capital stock of the company, or agreements entered into preparatory and preliminary to the perfect incorporation or organization of the association, and which are therefore necessarily conditional, depending for their validity, upon the completion of the organization according to the terms of the statute incorporating or authorizing the incorporation of the company. This condition is implied, in the undertaking, and is as much a part of it as if expressed in terms. Such are the cases of

Salem Milldam Corporation v. *Ropes*, (6 *Pick.* 23; *S. C.* 9 *id.* 187;) *Central Turnpike Corporation* v. *Valentine*, (10 *id.* 142;) *Hamilton and Deansville Plank Road Co.* v. *Rice*, 7 *Barb.* 157.) There is a manifest distinction between actions of that character and those growing out of dealings with the corporation, after it should claim to be an incorporated company, and should be in the full exercise of corporate privileges, and brought by or against third persons, strangers to the corporation. It may be said of the relation which the insured in mutual insurance companies occupy in respect to such companies, that it is peculiar. While for some purposes they are corporators, and members entitled to the privileges and subject to the liabilities incident to that relation, for other purposes they are treated as third persons and strangers, and in actions by or against them, growing out of their dealings with the corporations, their rights and remedies would not be other or different than they would be were they not members or corporators for any purpose. There is nothing in the complaint from which I can infer that the notes, against which relief is sought, were made at and in order to the organization of the company; and whether, if they were, the result would be changed, I am not prepared to say. If the company had in form a charter authorizing it to act as a body corporate, and was in fact in the exercise of corporate powers at the time of its dealing with the plaintiffs, then it was, as to them and all third persons, a corporation *de facto*, and the validity of its corporate existence can only be tested by proceedings in behalf of the people. (*Per Senator Beardsley*, 7 *Wend.* 553. *Trustees of Vernon Society* v. *Hills*, 6 *Cowen*, 23.) In *Wood* v. *Jefferson Co. Bank*, (9 *id.* 194,) the act under which the plaintiff claimed to have become incorporated did not make any particular persons a corporation, but provided for subscriptions to the capital stock, and that before the issuing of notes, &c. by the bank, an affidavit that certain things had been done, should be made by the president and cashier, and filed, and the plaintiffs showed by their books the election of officers and the making and filing

of the affidavit, and it was held sufficient *prima facie* proof of the existence of the corporation.

It is said that fraud vitiates every, even the most solemn acts, and this is true as well of judicial and legislative acts, as acts *inter partes*. But it does not follow that every individual may assert fraud with a view to impeach the validity of every public act. So far as the fraud alleged affects the validity and legal existence of the supposed corporation, it concerns the public interests, as it relates to and affects the validity of the contract between the public and the associates, or the power which the latter claim to have acquired under the laws; and the people, or some one having by law authority to represent them, can alone investigate the fraud, and ask that the charter may be annulled or adjudged never to have had an existence. So far as the fraud alleged has wrought an injury to individuals, beyond that which has been sustained by the public at large, to that extent they may have relief. If parties have been induced to enter into contracts of insurance upon a fraudulent representation of the agents and officers of the company in regard to its capital or pecuniary resources and ability, or any other matter which rightfully influenced them in the negotiation, they may be relieved against their contracts; but as it is not necessary for their protection to go beyond that and declare the non-existence, for any purpose, of the corporation, it should not be done. Perhaps the facts will warrant an amendment of the complaint, so as to entitle the plaintiffs to this relief. (*See per Bronson, Ch. J.*, 4 *Denio*, 397.)

The only remaining question is whether the plaintiffs have shown the Utica Insurance Company acting under a charter or an authority apparently valid, and really so, unless impeached by something outside of the record evidence of the corporate existence, and depending upon proof *aliunde*. If they have, and have thus furnished *prima facie* evidence of the incorporation, they cannot go behind that evidence to show that it was got up in fraud or mistake, or irregularly brought into existence. The decision of this question depends upon the true construction of the act under which the company undertook

to organize and became incorporated, and what acts shall be deemed conditions precedent to the complete organization of the company, and what shall be the evidence of the performance of these conditions. The statute under which the company was formed, (1 *R. S. 4th ed.* 1279,) authorizes any number of persons not less than thirteen, to associate and form an incorporated company, for the purposes of health, life, marine or fire insurance; and section five of the act provides that no company formed and located out of the city of New York or county of Kings, for the purpose of doing the business of fire insurance on the mutual plan, shall commence business until agreements have been entered into for insurance, the premiums on which shall amount to $100,000, and the notes received therefor. A previous section had authorized the filing, in the office of the secretary of state, of a declaration of intention on the part of the proposed corporators, and a copy of the proposed charter. The extent to which the filing of the declaration and charter authorizes the associates to act as a company, is to enter into the conditional engagements for insurance, and to receive the premium notes to become valid and effectual as agreements upon the complete organization and incorporation of the association. That act does not constitute the association a corporation. The accumulation of the capital, by way of the premium notes, for the protection and security of the public, I cannot but think, is a condition precedent to the full organization of the company. And the act does not stop here, but by § 11 it is required that an examination shall be made by the comptroller or a commissioner appointed by him, who shall certify, under oath, that the company is in possession of the capital and premium notes, &c. to the full extent required by the fifth section of the act; that copies of this certificate shall be filed with the secretary of state, whose duty it shall then be to furnish the corporation with a certified copy of the charter and certificates, which, upon being filed by them in the office of the clerk of the county in which their company is to be located, "shall be their authority to commence business and issue policies, and the same may be used for or against said

corporation." Without the certificate demanded by the 11th section, the corporation would have no authority to commence the business of insurance, notwithstanding the requirements of the fifth section had been complied with, and the design was to furnish record evidence of the corporate existence of the company. The charter, or the evidence of the grant of the franchise from the people to the corporators, is their charter on file, and the certificates of the examiners of their securities, or properly authenticated copies of them, which take the place of a special act of the legislature, incorporating them by name. It was not intended to leave the fact of the possession by the company of the requisite amount of premium notes, at the time of its organization, to be proved as a matter *in pais*, or to leave it an open question, liable to contestation by every individual having dealings with the corporation. The legislature provided a tribunal for the adjudication of this question, and its determination is final, so far as the existence or non-existence of the corporation is concerned, until impeached and overthrown by a proceeding instituted by the people or their representatives, for that purpose. The reason and policy of the law is very obvious, and without an express provision to that effect, such would be the legitimate effect and construction of the act, and such construction would be in harmony with the decisions of our courts upon analogous statutes. (*Jefferson Co. Bank* v. *Wood, supra. The Fire Department* v. *Kip. Caryl* v. *McElrath*, 3 *Sandf.* 176.) But the statute is explicit, and, as I read it, leaves no room for construction. It makes the copies of the charter and certificates filed in the office of the county clerk, "*the authority*" of the corporation to commence business and issue policies, and makes them evidence for or against the company; that is, evidence of the authority to act as a corporation. The legislature having said what act or acts shall give the company corporate powers, and what shall be the evidence of those acts, as well for as against the company, courts cannot, at the instance of third persons, go behind those acts and the prescribed evidence of them, for the purpose of determining the validity of the corporation and

make the decision, perhaps, depend upon some mistake or accident from which no one has received, or can receive, any injury. The certificate of the examiners is, I think, a substantial, although not a literal compliance with the act, and the law looks to the substance rather than the letter of the transaction. The fifth section requires "agreements" for insurance to be entered into, the premiums on which shall amount to a sum named, and the eleventh section requires the certificate to state that the company is in possession of "engagements" of insurance to the full extent required by the fifth section. The certificate is that the company had notes given on "application" for insurance, to the prescribed amount. The agreements or engagements mentioned in the statute, could be only inchoate and conditional, until the full organization of the company. They could not until then ripen into actual contracts of insurance. Either party could then be compelled specifically to perform the engagement or agreement. But an application accompanied by a note, for the proposed premium, accepted and acted upon by the company, is as valid an engagement or agreement as can be made. It is in words the very engagement or agreement contemplated by the act; as that could only remain an application accepted by the company, to be acted upon and consummated at the option of either party, after the company should be authorized to issue policies. The terms must be construed in reference to the situation of the parties and the subject to which they relate.

The plaintiffs are not entitled to the relief asked upon the first cause of action, on the facts alleged, and the demurrer must be allowed, with leave to the plaintiffs to amend, on payment of costs.

[Onondaga Special Term, February 12, 1855. *W. F. Allen*, Justice.]

24 404
52 395
63 252
51a 578
115a 211
115a 239

HUBBARD *vs.* RUSSELL and others.

In an action against the continuator of a private nuisance originally erected by another, to recover damages for the injury sustained thereby, the plaintiff must prove a notice to the defendant, of its existence, and a request to remove it.

Where two letters are written simultaneously, signed by the same individual, containing the same words, and addressed to the same person, one being sent to the person addressed and the other retained by the writer, each is an original, and the one retained may be given in evidence without proving any notice to produce the other.

Where the plaintiff offers evidence, at the trial, which is received without any objection on the part of the defendant that the proper foundation was not laid for it in the allegations of the complaint, the objection cannot be raised afterwards, but will be considered as having been waived.

THE plaintiff brought his action against the defendants for wrongfully overflowing and covering with water a portion of his land, described in the complaint, by means of a dam belonging to them, and averred that they had so damaged his land ever since his ownership of it. The defendants denied this, and then justified their right to overflow the land by the dam at its height, at the time of the commencement of the action. They did not set up want of notice, or any thing on that subject. At the trial the plaintiff established his case, and rested. The defendants called a witness to prove that the dam had not been raised by the defendants, and read in evidence their deeds, and then moved for a nonsuit, on the ground that the nuisance, if any, had not been *created* by the defendants, but merely continued by them as they found it; and that, therefore, the plaintiff must prove notice to them of the existence of such nuisance, the extent of it, and a request to abate or remove it, before the action could be brought. The court intimating that this was well taken, the plaintiff introduced William W. Scrugham, the plaintiff's attorney, as a witness, who testified: "I wrote to Mr. George Russell, August 4th, 1851; I have a copy of the letter now in my hand; I wrote to him at the request of Mr. Hubbard." The plaintiff then offered to read in evidence the copy of a letter written to Mr. George Russell, of the date of 18th of December, 1852. The defendants objected that no

notice had been given to produce the original. The court sustained the objection, and the plaintiff excepted. The plaintiff's counsel then gave the defendants' counsel parol notice to produce the original; the defendants' counsel objected that the notice was insufficient. The court sustained the objection, and the plaintiff excepted. The witness further testified, "I received the letter which I now have in my hand, dated December 31st, 1852; I think the letter is in Dr. Hibbard's handwriting, but I don't know; after its receipt, Hibbard acknowledged that the letter had been written in answer to one from me, addressed to the firm of Russell, Stiles & Hibbard." The plaintiff's counsel then offered in evidence a copy of the letter to which the letter of the 31st of December, 1852, was an answer; the defendants objected; the court sustained the objection, and the plaintiff excepted. The plaintiff then read in evidence the letter of the 31st of December, 1852, as follows, viz:

"No. 145 Water st. New York, Dec. 31st, 1852.

WM. W. SCRUGHAM, Esq.

SIR: Your note of the 18th inst., stating that Mr. R. Hubbard complains that we overflow a portion of his farm, without legal right, is received. We beg to apologize for the delay in answering it. We are not aware of any cause for the complaint, and would be pleased to see Mr. Hubbard, for the purpose of learning definitely of the facts of which he has complained. We desire, if possible, to live on good terms with our neighbors. Very respectfully,

RUSSELL, STILES & HIBBARD."

The witness also testified: "I had an interview with Hibbard about the correspondence; I spoke also of the subject matter of the correspondence; I was acting for Hubbard, the plaintiff; I can't tell what was said, with any precision; the conversation was about this nuisance of overflowing the land of Hubbard; I told them of Hubbard's claim; I told Hibbard they should settle it, or make some amicable disposition of it, and thus avoid a law suit; Hibbard denied that he, the plaintiff, had any rights there, or that they trespassed upon him, in the least;

the conclusion to which we came was, that there had better be a law suit to try the right; I don't remember any thing more · the defendants are all in business together." Here the defendants rested, and renewed the motion for a nonsuit, on the grounds above stated; and further insisted that the evidence given by the last witness did not obviate either of these objections. The court then, upon the ground mentioned as the first taken by the defendants, granted the motion for a nonsuit, and the plaintiff's counsel excepted. He now, upon a bill of exceptions, moved for a new trial.

W. W. Scrugham, for the plaintiff.

J. W. Tompkins, for the defendants.

S. B. Strong, P. J. The alleged nuisance in this case consisted in continuing to overflow the plaintiff's land by the defendants' millpond. The nuisance had not been originated by the defendants, or either of them, but was created by those from whom they derived their title. The margin of the pond was the same when they took their deed as it was when this action was instituted. The conveyance to the defendant Russell, under whom the other defendants claim title, is dated on the 30th of September, 1848, since which time the defendants, some or one of them, have been in the possession (claiming title) of this land which is covered by such conveyance. The plaintiff acquired his title by a deed dated on the 9th day of June, 1851. If it had appeared clearly that the defendants' deed had included in its boundaries all the land overflowed by their pond, as it purported to convey the absolute fee of what it described, then it would have followed that the defendants held the land adversely when the plaintiff took his conveyance, and that would have been imperative so far as it related to the title to the land which was overflowed. However, that does not distinctly appear, and as the nonsuit was not granted upon that, but exclusively upon another ground, the

question of adverse possession does not legitimately arise on the motion for a new trial.

The nonsuit was granted on the objection that it did not distinctly and satisfactorily appear that the defendants had been requested to abate the nuisance, and had subsequently neglected to do so. It does not seem to have been clearly settled that such a request is necessary. Starkie says in his work on evidence, (*vol.* 3, *p.* 992,) that it should seem that giving of such notice is unnecessary in order to enable the alienee to maintain an action against a wrongdoer who is guilty of a continuing nuisance, by neglecting to remove it. But the editor of my edition of that work subjoins a *quære* to this position of the learned author, and I think with good reason. It had been decided in *Penruddock's case*, (5 *Coke*, 101 *a*,) that the request was necessary. The case was quoted with approbation by Lord Chief Justice Willes, (*Willes' Rep.* 583,) who remarks, that "as to the distinction between the beginning and continuance of a nuisance by building a house that hangs over or damages the house of his neighbor, that against the beginner an action may be brought without laying a request to remove the nuisance, but that against a continuer a request is necessary; for which *Penruddock's case* (5 *Coke*, 100, 101,) was cited, *and many others might have been quoted; the law is certainly so, and the reason of it is obvious.* *Chitty*, in a note to his work on *Pleading*, (*vol.* 2, *p.* 333, *n. c*,) applies the rule to nuisances generally. He says, "if the action is not brought against the original creator of the nuisance, but against his feoffee, lessee, &c. it is necessary to allege a special request to the defendant to remove the nuisance." The cases of *Crippen* v. *Bowles*, (1 *Roll. R.* 222,) and *Lambert* v. *Berry*, (*Raym. R.* 424,) would seem to indicate a different rule in reference to obstructions to ancient lights and private ways, but there may be something peculiar to each of those injuries, calling for an exception to the general rule. If not, I should consider the rule requiring a notice to the continuator of a private nuisance and a request to remove it as a reasonable one, and established by the latter authority, and am inclined to continue it If

the action is a substitute for the ancient remedy under the head of *quod permittat*, it would seem to follow that a knowledge of the wrong should in some way be brought home to the person charged. A permission implies something more than mere involuntary acquiescence.

But it seems to me that the plaintiff proved, or offered to prove, sufficient to infer a request to discontinue the nuisance. He offered in evidence a letter to that effect, written by his attorney. The letter was rejected, on the ground that it was a copy, and no notice had been given to the defendants to whom it was addressed, to produce the original. The objection was, under the circumstances, entirely technical, and was not, I think, valid, even under the strictest technical rule. The letter retained by the plaintiff's attorney, and that sent by him to the defendants, were duplicates. They were written simultaneously, signed by the same individual, contained the same words, and were addressed to the same person. Each was an original—the one retained as much as the one sent. In the case of *Ivry* v. *Orchard*, (2 *Bos. & Pul.* 39,) the plaintiff's attorney made out two papers (notices) precisely to the same effect, and signed them both for his client, one of which he delivered to the defendant, and the other, which was produced on the trial, he retained, and it was held that the one retained might be given in evidence, without proving any notice to produce the other. Lord Eldon said that the strong inclination of his opinion was, that the paper retained was a duplicate original. That the practice of allowing duplicates of this kind to be given in evidence seems to be sanctioned by this principle, that the original delivered being in the hands of the defendant, it is in his power to contradict the duplicate original by producing the other, if they vary. Buller, J., said, "the attorney in this case made the copies of the paper, one of which he meant to deliver · he signed both, and it was indifferent which of them he delivered, for they were both originals." Heath, J., concurred, and it was decided (one judge dissenting) that the paper offered should have been received in evidence. Starkie (*vol.* 2, 275,) quotes this decision with approbation, and says, "it seems to be suffi-

cient in all cases to prove the service of a duplicate notice. It seems to me that the letter offered in evidence in the case under consideration should have been received. But if not, the letter addressed by the defendant to the plaintiff's attorney was properly given in evidence, and that expressly acknowledged the receipt of a note stating that the plaintiff complained that the defendants overflowed a portion of his farm, without legal right. I cannot see why that letter, if it stood alone, would not have been sufficient to prove notice of the continuance of the nuisance, and a consequent request that it should be removed.

The nonsuit should be set aside, and a new trial granted, costs to abide the event of the suit.

Birdseye, J. The plaintiff gave evidence on the subject of the notice to the defendants before suit brought; and this evidence was received without objection on the part of the defendants, that the proper foundation was not laid for it in the allegations of the complaint. Had this objection then been taken, the court might, and probably would, under the 173d section of the code, have permitted an amendment, by inserting the necessary allegations in the complaint. But the defendants having been silent when that objection might have been got rid of, if it had been raised, ought not now to be permitted to speak. So far as the submission of that question to the jury is concerned, they should be held by their conduct at the trial, to have waived the objection that the proper foundation for this proof was not laid in the pleadings. If this view is correct, this proof should have been submitted to the jury. When it is considered that in the conversation with the attorney for the plaintiff, one of the defendants denied that the plaintiff had any rights in the premises in dispute, or that they trespassed upon him in the least, it would seem that the jury should have been instructed to inquire whether that did not supersede the necessity of giving any notice, or making any request to abate the nuisance. It is difficult to see of what use this notice and demand could be, when the defendants in-

sisted that the plaintiff had no rights whatever in the premises, and that they were not trespassing upon him at all.

I am of opinion that the present action, which is substituted for the writ of nuisance by §§ 453, 4, of the code, is governed by all the rules of the code in regard to amendments, the principles of pleading, the rules in regard to parties, &c. In this respect this action resembles the action which, by § 449, is substituted for the proceedings to compel the determination of claims to real estate. In *Mann* v. *Provost*, (3 *Abbott*, 446,) it was held that the court had the power to relieve against defaults, as in an ordinary action. It is true there is a difference in the language between § 449 and § 454; but still I think the latter section gives to the court all the power over the action substituted for the writ of nuisance, and applies to it the rules as to parties, &c. which apply to common actions. This being so, any defect of parties, in not joining the erector of the nuisance with the defendants, as continuators of it, was waived by failing to set it up, either by demurrer or answer. (*Code*, §§ 144, 147, 148.) And the power to amend the complaint to conform it to the facts proved, was given by § 173. The nonsuit should be set aside and a new trial granted, costs to abide the event.

EMOTT, J., concurred.

Judgment accordingly.

[KINGS GENERAL TERM, January 13, 1857. *S. B. Strong, Birdseye* and *Emott*, Justices.]

ELIZABETH R. SMART, by her next friend, *vs.* COMSTOCK.

Where money belonging to a married woman and which has never been in her husband's possession, is lent by her, with his assent, and a promissory note given to her for the amount, she may maintain an action thereon without joining her husband as co-plaintiff.

Where a female, prior to her marriage, comes into the possession of money, which she invests, and after her marriage she keeps the same in the form of a chose in action, payable to her, with the express consent of her husband, it remains her property, and an action upon the security is properly brought in her name alone.

APPEAL from a judgment entered at a special term. The action was brought upon a promissory note for $100, made by the defendant on the 1st of May, 1849, and payable to the plaintiff, Elizabeth R. Smart, or order, on demand. The complaint alleged that the plaintiff was the lawful owner and holder of the note, and that the defendant was indebted to her thereupon. The answer contained a general denial of the allegations in the complaint. The evidence established the making of the note, and that the plaintiff was, at the date thereof, a *feme covert*, and that her husband, Benjamin Smart, is still living; that she was married prior to 1848, and that the consideration of the note was money lent by the plaintiff to the defendant, and which money had never been used by her husband, but had been kept by her as her separate property. Judgment was given for the defendant, and the plaintiff appealed.

E. M. Swift, for the appellant.

Nelson & Pultz, for the respondent.

S. B. STRONG, J. At common law, and previous to the passage of our statute for the more effectual protection of the property of married women, (*Act of April* 7, 1848.) the husband was entitled to the personal property (including the choses in action) of the wife at the time of their marriage or acquired in her behalf during their joint lives. He might, however, deprive himself of such right by an agreement before marriage, or a waiver in favor of the wife afterwards. He might, if he chose, allow the wife to retain or have as her separate estate what had

been given to her by others, or, (except as to his creditors,) by himself. If under such an arrangement or understanding he had received any of such personal estate or its avails, it would have been as her trustee, and she could not have lost her interest in or control of the property. The principle that such reception did not alter the wife's right was recognized by Chancellor Walworth in *Partridge* v. *Haven*, (10 *Paige*, 618;) by this court in *Merritt* v. *Lyon*, (3 *Barb. S. C. R.* 110,) and by the court of appeals in the last mentioned case, on an appeal from a decision in it made subsequent to that in the 3d of Barbour and somewhat in conflict with it, although it was not intended to overrule it, as assumed by my associates. In the case under consideration the money had been given to the plaintiff before her intermarriage, by her father, or it had been distributed to her as one of his next of kin. She had always had the control and management of it as her private property for her own use; and that she had done so pursuant to an arrangement with her husband, or at any rate with his consent, is clearly inferrible from the fact that he drew the note and made it payable to her. The transaction is entirely clear of any charge of fraud, and involves simply a question of right between husband and wife, raised by a third person, and evidently without the connivance of either. The case steers clear of the exception in the 3d section of the act of April 11, 1849, amending the act of 1848, as the money was not given to the wife by the husband, but she had been allowed by him to retain what she had derived from her father's estate. The 2d section of the act of 1848, as there is no pretense of any violation of the previously acquired rights of the husband, and his creditors are not concerned, is applicable to this instance; and according to the cases under the two statutes for the protection of the property of married women, she can maintain this suit without joining her husband as co plaintiff.

It is unnecessary to consider whether, as independent of those statutes, the husband and wife might have jointly sued on this note, the non-joinder of the husband would have been fatal to the suit. That the action might have been maintained at com-

mon law in their joint names seems to have been settled in *Nash* v. *Nash*, (2 *Mad. Ch. C.* 133,) which is quoted with approbation by *Clancy*, (*p.* 7,) in his admirable work on the rights of married women.

The judgment at the special term should be reversed, and there should be a new trial, costs to abide the event of the suit.

BIRDSEYE, J. If the money for which the note in suit was given, belonged to the plaintiff at her marriage and was then in her possession, it was by the marriage given to and became the property of the husband. The marriage operated as a gift of it to the husband. (2 *Kent*, 143. *Clancy's Rights of Mar. Women*, 2, 3, 8*th ed.*) But if instead of being at that time in the form of money, it was then invested upon contract, as by note; or bond and mortgage; or if it was otherwise a chose in action, then the husband's right thereto, instead of being, as in the other case, absolute, was only limited and qualified. He must reduce them into possession, before they become his absolutely. But he is not compelled to reduce them to his possession. It is optional with him, whether to do so or not; certainly as to the debtor, whatever may be the rule as to his own creditors. The testimony in this case is consistent with the fact that the wife had received this money prior to the marriage, and had invested it, and had kept it ever since in the form of a chose in action, with the express consent of the husband. If so, it was still her property. And this action was properly brought in her name. Instead of rendering judgment for the defendant absolutely, without passing upon the point specifically, this fact should have been found one way or the other; and the judgment would have followed, for the plaintiff, if it appeared that the husband had omitted to reduce the chose in action to his possession.

The judgment should be reversed and a new trial granted with costs to abide the event.

EMOTT, J., concurred. New trial granted.

[KINGS GENERAL TERM, January 13, 1857. *S. B. Strong*, *Emott* and *Birdseye*, Justices.]

24 414
49 154
62 621

WHEELER *vs.* THE NEW YORK AND HARLEM RAIL ROAD COMPANY.

The return of a constable, certifying the time and manner of his serving a summons upon the defendant, is presumptive evidence of what it states. If it appears from that return that the process has been regularly served, and nothing is shown, or offered to be shown, to the contrary, the justice is authorized to proceed in the action; and his judgment, if otherwise regular, cannot be controverted in the same, or a collateral suit.

Where the statute designates one or more officers of a corporation upon whom process against it may be served, the return of the constable is, in like manner, evidence as to the official character of the person served with such process, and of the facts which justify such service. BIRDSEYE, J., dissented.

But where the defendant appears in season, he may, notwithstanding the constable's return, raise and avail himself of the objection that the summons was not served in such a manner as to confer jurisdiction upon the justice.

Accordingly, where, in an action against a rail road company, the constable returned upon the summons that he had served the same personally on A. B., freight agent of the defendants, at &c., no person having been designated by them upon whom process might be served in the said county, according to the statute, and that no officer of the company resided within the said county, upon whom process could be served; *it was held* that the defendants should have been permitted to show that the service upon the freight agent was unauthorized by the statute, inasmuch as there was a resident director in the county.

APPEAL from a judgment of the Dutchess county court. The action was commenced before a justice of the peace, by a summons issued on the 16th day of July, 1855. Upon this summons the constable made the following return:

"The within summons personally served on the within named defendants, this 16th day of July, 1855, by serving said summons, personally, on William H. Fowler, freight agent of said defendants, at the North East station, in the town of North East aforesaid, no person having been designated by said defendants upon whom process may be served in the said county of Dutchess, according to the provisions of section 14 of an act entitled an act to amend the act entitled an act to authorize the formation of rail road corporations, and to regulate the same, passed April 2d, 1850, passed April 15, 1854 and that

no officer of the within named rail road company resides within the said county of Dutchess, upon whom process can be served.

PETER FRISS, Constable."

On the return day of the summons the plaintiff appeared and filed his complaint, in writing, and the cause was adjourned until the 31st of July. The parties then appeared, by their counsel, and the defendants asked and obtained leave to answer. The defendants' counsel produced an affidavit showing that Albert J. Akin, one of the directors of the defendants' company, at the time of the issuing of the summons resided, and still resided in the town of Pawlings, in the said county of Dutchess. The defendants moved to quash the summons and dismiss the suit, on the ground that the summons had not been legally served, so as to obtain jurisdiction of the persons of the defendants, because, 1. Service of said process could not be legally made upon Fowler, he not being an officer, superintendent or managing agent of the defendants; and 2. Because at the time of issuing of said process, before and ever since, Albert J. Akin was one of the directors of the company of the defendants, and was a resident, then, before and ever since, and still was a resident of Pawlings, in said county of Dutchess, and a person upon whom process could be served. The motion was denied by the justice. The defendants then put in an answer, and the cause proceeded to trial. The action was brought to recover damages for injuries done to a pair of oxen belonging to the plaintiff—one of them being killed—by the engine of the defendants, upon their rail road. The jury found a verdict in favor of the plaintiff, for $70 damages; and the justice rendered a judgment for that sum, with costs. The county court, on appeal, affirmed the judgment, and the defendants appealed to this court.

R. G. Dorr, for the appellants.

N. Wodell, for the respondent.

S. B. Strong, J. The return of a constable certifying the time and manner of his serving a summons upon the defendant, is undoubtedly presumptive evidence of what it states. If it appears from that return that the process has been regularly served, and nothing is shown, or offered to be shown, to the contrary, the justice is authorized to proceed in the action, and his judgment, if otherwise regular, cannot be controverted in the same or a collateral suit. Where the statute designates one or more officers of a corporation upon whom process against it may be served, I am inclined to think that the return of the constable is in like manner evidence as to the official character of the person served with such process, and of the facts which justify such service. This principle seems to be necessary, in the administration of justice, as the magistrate could not otherwise be protected where the officer should make a false return in a jurisdictional particular. But it seems to me that the reason (the inability to obtain information upon the subject of the return) is inapplicable when the defendant appears in season and offers to prove that the process has not been legally or at all served upon him. There the justice is or may be apprised, at once, that he ought not to entertain jurisdiction over the defendants; for, in truth, no action should (or, but for the reason which I have mentioned, could in any case) be sustained against one who had received no legal notice of its institution or pendency. I am not aware of any case where it has been decided that a defendant who appeared in season could not raise and avail himself of the objection that the primary process had not been served in such a manner as to confer jurisdiction upon the magistrate. In this case I think that the defendant should have been permitted to show that the service upon the freight agent of the company was unauthorized by the statute, as there was a resident director in the county

The declarations of the engineer, at a time subsequent to the accident, were not legitimate evidence against the company, and should not have been received. True, they had no bearing upon the only point in controversy—the sufficiency of the service—but they had a tendency to show negligence, and may

have misled the jury. Indeed it is probable that such evidence induced the jury to decide the action upon a point foreign to the case, as the weight of evidence upon the point actually involved was in favor of the defendant.

The judgment of the justice and of the county court, should be reversed.

EMOTT, J., concurred.

BIRDSEYE, J. The statute respecting the commencement of suits in justices' courts, (2 *R. S.* 228, §§ 13–16,) and the summons issued in pursuance thereof, make it the legal duty of the constable to serve the process, in a certain manner, and to return thereon, in writing, the time and manner in which he executed the same. Upon a familiar principle, whatever he does and certifies in the performance of this official duty is evidence, and, as between parties to the process, or privies, conclusive evidence, and not liable to collateral impeachment. (*Cowen & Hill's Notes to Phil. Ev.* 1047, 8, 1083, 5, 7.) But it is nowhere made the duty of a constable, receiving for service a summons against a rail road corporation, to ascertain or to certify whether there be any director or other officer of the corporation on whom process can be served, according to the existing provisions of law, resident in his county, or whether the corporation has failed to designate some person on whom such process can be served, and to file such designation in the office of the county clerk. (*See Laws of* 1854, 613, 614, §§ 14, 15.) Of what effect the constable's certificate or return on either of these points can be, I do not perceive. As to the latter, for instance, the county clerk is the proper person to certify. If the constable has any knowledge or information in regard to it, he must obtain the same from the clerk. If he obtained it orally, how can we know that he correctly understood, or remembered, or certified the statements made to him. If he obtained the written certificate of the clerk, (which would undoubtedly be good evidence of the designation, or of the failure to file it, (2 *R. S.* 552, § 12,) why should

not the court have the same evidence. Upon what principle, or by what authority, may he suppress it, and give his own certificate of that fact, and without even referring to the certificate of the clerk? The same remarks apply to the alleged non-residence of any officer on whom process can be served, according to the existing provisions of law. Perhaps a constable who is personally acquainted with every resident of his county, or who personally knows all the officers of a rail road, as well as the fact that each of them resides in some specific place out of his county, may truly make the return or certificate made by the constable in this case. But it cannot be presumed that any constable, much less that *every* one, would possess this knowledge. No constable is bound to obtain such knowledge. And if he certifies to it, I know not how his return can become even *prima facie* evidence of the matters he states.

As then the justice of the peace could obtain jurisdiction of the action by such a service on the freight agent of the defendants as was made in this case, only in case of the non-residence in Dutchess county, of some one of the superior officers of the company, on whom, by law, process could be served, and then only by the failure of the company to designate some other person in the county on whom such process could be served; and as there was no legal evidence before the justice, upon either point, I do not see that he obtained any jurisdiction of the action whatever, or had any power to adjourn from the 25th to the 31st of July.

When the defendants appeared upon such adjourned day, and took the objection that one of the directors of the defendants did not reside in the county, and made proof of that fact, and moved to dismiss the summons and the suit, the justice denied the motion, insisted that he had acquired full jurisdiction of the action, and proceeded to hear it and give judgment. In so doing, he must have proceeded on the ground that the return of the constable, stating the facts which alone conferred jurisdiction, was not only evidence, but conclusive evidence of those facts. I think he was in error in holding the return conclusive. As I have already said, I do not think it was even prima facie evi-

dence. It was, so far as these facts are concerned, an unofficial statement, and therefore merely *hearsay*. (*See Williams* v. *Merle*, 11 *Wend.* 80, 82.)

When this objection, properly taken and sufficiently supported, had been overruled, the defendants answered and went to trial on the merits. This was no waiver of their objection to the jurisdiction. (14 *John.* 481. 4 *Barb.* 320, 545. 9 *id.* 60. 11 *id.* 309.)

I entertain no doubt that the evidence of the declarations of the engineer, made subsequent to the time when the plaintiff's cattle were injured, in regard to the defectiveness of the light on the engine, at the time of the supposed accident, was improperly admitted. He was a competent witness for either party. His declarations were clearly not a part of the *res gestæ*. It is only where the agent's declarations are so, that they are evidence against his principal. (4 *Wend.* 394.

Without examining the other questions in the case, I am of opinion that the judgments of the county court and the justice must be reversed.

Judgments reversed.

[Kings General Term, January 13, 1857. *S. B. Strong*, *Birdseye* and *Emott*, Justices.]

Brown *vs.* Smith and others.

24 419
48 52
61 609
67 475
4L 163
6L 280
8b 234
35a 243
35a 253
61a 269

Venue
69 App. Div. 415

Where the act of an officer is of such a nature that his office gives him no authority to do it, he is not protected by the section of the statute which requires suits against him to be brought in his own county; but where, in performing an act within the scope of his authority he commits an error, or even abuses the confidence which the law reposes in him, he is still entitled to the protection of the statute.

In determining the question as to the residence of a person owning real estate subject to taxation, assessors act judicially. And when acting judicially, within the scope of their authority, they are not liable to an action, although they err.

Accordingly, where the plaintiff's farm lay partly in the county of Otsego and partly in the county of Herkimer, his residence being in the latter county and the defendants, assessors of a town in Otsego county, assessed the whole of the farm to him in that county, and upon a warrant issued for the collection of the

tax, the plaintiff's property was taken and sold; *it was held* that no action would lie against the defendants, for such erroneous assessment.

Prosser v. *Secor*, (5 *Barb.* 607,) overruled.

APPEAL from a judgment of the Herkimer county court. The action was brought by the plaintiff against the defendants, who were the assessors of the town of Plainfield in the county of Otsego, for wrongfully and unlawfully assessing or causing to be assessed the lands of the plaintiff, whereby and in consequence whereof the plaintiff was obliged to pay an illegal tax of about $12. The action was commenced by warrant issued by a justice of the peace of the town of Winfield, Herkimer county, and was tried in that town. The complaint alleged that the defendants were residents and assessors of the town of Plainfield in Otsego county, in 1855, and that as such they wrongfully assessed the farm of the plaintiff in said town of Plainfield, Otsego county, in that year, in consequence of which act the board of supervisors of Otsego county had issued a warrant to the collector of Plainfield, to collect a tax on said farm for the year 1855, and that the collector by virtue of said warrant had taken the personal property of the plaintiff and sold it to collect said tax. The plaintiff claimed to recover of the assessors the value of the same. Two of the defendants were arrested on said warrant, and answered the complaint by admitting that they were assessors of Plainfield as alleged in the complaint, and that they assessed the plaintiff's farm in Plainfield in 1855, and claimed and alleged a right so to assess said farm &c., and denied the plaintiff's claim to recover against them for so doing. The plaintiff's farm, consisting of about 200 acres, lay in the towns of Winfield, Herkimer county, and Plainfield, Otsego county, and the county line between the counties of Herkimer and Otsego, and the town line between the towns of Winfield and Plainfield passed nearly through the centre of the farm. The plaintiff claimed to reside in Winfield and his farm was assessed in Winfield; the defendants claimed that he resided in Plainfield, and assessed his whole farm in Plainfield. On the trial there was some conflicting evidence as to his place of residence, and the justice found that he was a resident of the

town of Winfield. It was proved that a heifer of the plaintiff was levied upon and sold, by virtue of the warrant issued for the collection of the tax. The justice rendered a judgment in favor of the plaintiff, against the defendants Smith and Spicer, for $13.50 damages and $2.51 costs. The defendants appealed to the county court, and relied upon the following grounds for reversing the judgment, viz: 1. That the justice erred in refusing to let the defendants prove by the witness King what the cow sold for. 2. That inasmuch as this was an action against the defendants for an act done by them *by virtue* of their office as assessors, the action was local, and should have been commenced in the county of Otsego, and could not be commenced and tried in the county of Herkimer. (2 *R. S.* 613, § 8, 4*th ed. Code*, § 124.) The county court affirmed the judgment of the justice, and the defendants appealed.

F. Kernan, for the plaintiff.

—— *Gardner*, for the defendants.

Bacon, J. The important question in this case is whether the defendants were not entitled to the protection of the statute which required the suit to be brought within their own county. And this depends upon the question whether the act, to wit, the assessment of the plaintiff's lands, was an act done *virtute officii* or *colore officii*. Where the act of an officer is of such a nature that his office gives him no authority to do it, he is not protected; but where, in performing an act within the scope of his authority, he commits an error, or even abuses the confidence which the law reposes in him, he is still entitled to the protection of the statute. It is somewhat difficult to preserve the distinction, and the cases consequently are conflicting and cannot all be reconciled.

The farm assessed was situated partly in Plainfield, Otsego county, and partly in Winfield, Herkimer county, and the plaintiff, as the proof stands, was properly taxable in the latter place. As to the land lying in Plainfield, the defendant plainly had jurisdiction of the subject matter, and the point for them to de-

termine was where the defendant resided. It must be conceded even on the evidence in this case, that this was by no means so clear a matter; and in determining it, the assessors acted judicially. And when acting judicially, within the scope of their authority, although they err, they are not liable to an action. (*Weaver* v. *Devendorf*, 3 *Denio*, 117. *Vail* v. *Owen*, 19 *Barb.* 22.) It seems to me a monstrous injustice to hold that where the law casts upon the assessors a duty to perform, and they exercise a judicial function in determining the questions committed to them, they are still liable to a prosecution if it turns out that they mistook that duty, or erred in its performance. The case of *Prosser* v. *Secor*, (5 *Barb.* 607,) which holds assessors liable where they assessed a minister of the gospel, is directly in conflict with *Weaver* v. *Devendorf*, (3 *Denio*, 117;) and I prefer the authority of the latter case, while the reasons upon which it is founded seem to me most consonant with what strikes me as the justice of the case. "The assessors," say the court, "were judges acting clearly within the scope of their authority. They were not volunteers, but the duty was imperative and compulsory, and acting as they did in the performance of a public duty in its nature judicial, they were not liable to an action, however erroneous or wrongful their action may have been."

The case of *Van Rensselaer* v. *Cottrell*, (7 *Barb*, 127,) is founded on the same principle, and holds that where lands are situated within the town in which the assessors reside, they have jurisdiction of the subject matter, and however they may err in the performance of their duty respecting its assessment, the error may be corrected in a court of review, but will not render their proceedings void. (*See also Van Rensselaer* v. *Witbeck*, 7 *Barb.* 133.)

Public officers have responsibilities enough to encounter without unduly straining a point to attach a liability where the law casts a duty upon them which in good faith they attempt to discharge. I think the judgments of the justice and of the county court should both be reversed. Judgments reversed.

[Jefferson General Term, April 7, 1857. *Hubbard*, *Pratt*, *Bacon* and *W F. Allen*, Justices.]

24 423
50 357
20a 298

RENO *vs.* PINDER.

Where a constable, to whom a summons had been delivered, by a justice of the peace, for service, brought it to the justice, and stated to him that he had personally served it on the defendant, and requested the justice to write his return thereon; and the justice thereupon took the summons and wrote this return upon it, in the presence of the constable: "Returned personally served, November 14, 1855. by B. W., Const., fees 75 cts." no name being signed thereto; *it was held* that this return was not sufficient to give the justice jurisdiction, and that a judgment founded thereon was void, and furnished no justification for the arrest and imprisonment of the defendant, by virtue of an execution issued upon it. GRAY, J., dissented.

THIS action was tried at the Otsego circuit in December, 1856, when the plaintiff obtained a verdict against the defendant for $500, damages. The defendant made a bill of exceptions, and the judge who presided on the trial, made an order staying the plaintiff's proceedings on the verdict, and directed that the defendant's motion for a new trial, on his exceptions, be first heard at the general term.

Two causes of action are set out in the complaint. In one of which the plaintiff, after stating that the defendant had twice maliciously, &c. prosecuted the plaintiff by summons before justices of the peace, and abandoned his actions on the return days of the summonses, alleged, in substance, that the defendant, well knowing that he had no reasonable or probable cause of action against the plaintiff for the conversion of a cow, falsely and maliciously caused a summons to be issued against the plaintiff, by a justice of the peace, that required the plaintiff to answer, in a civil action, the complaint of the defendant for merchandise, on book account, labor and services and money, to his damage $100; and that the plaintiff did not appear before the justice, in pursuance of the summons, on the return day thereof, because the defendant had a cause of action against him on an account, for which the plaintiff believed the defendant had sued him. That the defendant designedly procured the summons to be issued in the form aforesaid, so that the plaintiff would not appear before the justice on the return day thereof, and to enable the defendant to obtain a

judgment against the plaintiff on which he could imprison him. That on the return day specified in the summons, the defendant appeared before the justice, in the absence of the plaintiff, and complained in writing against the plaintiff for the conversion of a cow of the defendant, although the defendant well knew that the cow was the property of the plaintiff. That the defendant then proved a cause of action against the plaintiff, arising on contract, and not other or different; and that on such proof the defendant obtained a judgment before the justice in his favor, against the plaintiff, for $30 damages, besides costs. That the defendant afterwards procured an execution to be issued by the justice on such judgment, against the plaintiff's person, on which the defendant caused the plaintiff to be arrested and carried to the county jail of Otsego county, and there imprisoned for a long time, to the great damage of the plaintiff.

The other cause of action, set out in the complaint, was for the defendant's causing the arrest and imprisonment of the plaintiff, in the Otsego county jail, against his will, to his great damage, &c.

The defense set up in the answer, aside from denials of allegations in the complaint, was that the defendant caused the arrest and imprisonment of the plaintiff by virtue of an execution in due form, against his person, issued by a justice of the peace on a valid judgment in favor of the defendant, against the plaintiff, for the conversion by the plaintiff, of certain personal property belonging to the defendant.

The material question that arose on the trial, was as to the validity of the judgment of the justice of the peace, against the plaintiff, in favor of the defendant, and on which the execution was issued, by which the plaintiff was arrested and imprisoned at the instance of the defendant. The constable who took the summons to serve, carried it to the justice, and stated to him that he personally served it on the plaintiff on the 14th day of November, 1855, and requested the justice to write his return on it. The justice then took the summons and wrote this return on it, in the presence of the constable, to wit: "Returned

personally served, Nov. 14, 1855. by Brayton Worden, Const. fees 75 cts." The constable did not sign the return himself; and there was no return on the summons except the one written by the justice, above set forth. The judge charged the jury that the judgment of the justice of the peace was no justification to the defendant for the plaintiff's arrest and imprisonment. That the justice had no jurisdiction of the person of the defendant in the action before him. That no return of the service of the summons was made by the constable who served the same, and that the return of the service of the summons, made by the justice, was not sufficient to confer jurisdiction. That the written statement made on the back of the summons, by the justice, did not constitute a valid return, as the constable neither made nor signed the same; and that the defendant, Pinder, was therefore liable, in this action, for false imprisonment. The judge also charged, in substance, that the fact that the justice rendered a judgment against the plaintiff, in the action before him, was not of itself a bar to the action for malicious prosecution; because the justice did not acquire jurisdiction of the person of the plaintiff, inasmuch as no valid return was made on the summons in the action before him. The defendant's counsel took exceptions to the charge; and he now asked for a new trial, on a bill of exceptions.

J. E. Dewey, for the plaintiff.

D. C. Bates, for the defendant.

Balcom, J. It is provided by statute, that "The constable serving a summons shall return thereupon, in writing, the time and manner in which he executed the same, and sign his name thereto." (2 *R. S.* 228. § 16.) The verbal statement which the constable made to the justice, that he personally served the summons upon the plaintiff, on the 14th day of November, 1855, was no evidence of the service of the summons, on which the justice could act; and the indorsement of such statement upon the summons, by the justice, added nothing to its force.

The only evidence which the justice had of the service of the summons still existed in the verbal statement of the constable. Nothing was put upon the summons that was *per se* evidence of its service. The signature of the constable to the return on it was wanting. The statute says he shall "sign his name thereto;" and he could not employ an agent to sign it for him, for the plain reason that it is *his signature* to the return, with which the law presumes the justice to be acquainted, that gives the justice jurisdiction of the person of the defendant, and authorizes him to enter in his docket the manner the service has been made.

The production of the summons, with the indorsement on it which the justice made, upon the trial of this action, was no evidence whatever, that the summons was personally served on the plaintiff. The indorsement of the justice on the summons was but his written declaration in regard to a matter as to which he had no personal knowledge. It was no part of the duty of the justice to make the return, and his official oath did not bind him to make a correct one. The return was not made on the oath of either the constable or justice; and no legal proof was made before the justice, that the summons had been served on the plaintiff; and no proof of the service thereof was made on the trial of this action, except the justice testified that the constable told him he had served it. The justice had no right to proceed in the action before him on what the constable told him as to the service of the summons. He could not act on information which he did not derive in a legal way. The proof which the justice should have had, was the signature of the constable to the return on the summons.

The judgment of the justice was void. It did not justify the defendant in causing the arrest and imprisonment of the plaintiff by virtue of the execution which the justice issued on it. The action was therefore undefended; and the defendant's motion for a new trial must be denied with costs.

MASON, J., concurred.

GRAY, J., dissented; holding that no doubt could be entertained that if the constable himself had written the return in the precise form the justice did it for him, it would have been a good return; and he regarded it equally clear that he could authorize another to act as his amanuensis.

Motion for a new trial denied, with costs.

[OTSEGO GENERAL TERM, July 14, 1857. *Gray*, *Mason* and *Balcom*, Justices.]

SWIFT *vs.* THE CITY OF WILLIAMSBURGH.

The powers possessed by the common council of the late city of Williamsburgh to open, regulate, grade and pave streets, &c. instead of being general, were, by the law conferring those powers, made subject to certain important restrictions and limitations. No proceedings could be taken to open, regulate, grade or pave any street or avenue, except upon petition signed by one-third of the persons owning land situated within the assessment limits. These provisions of law being public, and all the preliminary proceedings leading to the determination of the common council to make a particular improvement, being matters of public record in the office of the city clerk, all persons are chargeable with notice of the law and of such proceedings.

If, therefore, an individual enters into a contract with the corporation, for improving a street, he cannot, after having performed a portion of the work, maintain an action against the corporation to recover damages, on the ground that he was induced to enter into such contract, and to perform the work upon the false representations of the defendants, that one-third of the owners of lands to be assessed had petitioned for the improvement, and that the corporation had taken the necessary proceedings to authorize them to make the same; whereas no such petition had in fact been presented, and the corporation had no power to cause an assessment for the expense of the improvement to be made, or to contract with the plaintiff for the performance of the work.

It is the duty of persons about to enter into a contract with the corporation for the performance of work in improving the streets, which is to be paid for by an assessment upon the district benefited, first to examine the records in the city clerk's office, to see whether a proper petition has been presented, and the other preliminary steps taken.

APPEAL from a decision made at a special term, upon the report of a referee. The complaint alleged that on or about the first day of February, 1853, the defendants, claiming

to act under their charter, represented to the plaintiff, that certain persons, being one-third of the owners of the lands in North-Seventh street, in said city, between the East river and Union avenue, had petitioned for the improvement hereinafter mentioned, and that the defendants had taken the necessary proceedings to authorize them to make such improvement under the provisions of said charter, and had such authority, and had determined to make the same and to assess the expense thereof upon the persons benefited thereby, as in such case provided by the said charter. And that upon such representations and claims, at the special instance and request of the defendants, the plaintiff entered into a contract with the defendants, whereby they mutually agreed that the plaintiff should grade, curb, gutter, bridge, pave and flag the sidewalks of said street in a certain manner, and that in consideration thereof, the defendants should proceed with all reasonable diligence to lay a sufficient assessment upon the adjacent lands benefited thereby, and collect the same with all reasonable diligence, and out of the moneys so collected pay to the plaintiff the sum of $3.40 for every foot of the length of said street along the center line thereof. And that under such contract the plaintiff proceeded to perform the work and furnish the materials required therefor, and performed a large portion of such work, to wit, the grading of such street. And that he had incurred great expense and performed a large amount of labor, in and about the providing and placing on the various parts of said street, and the lands adjacent to the same, large quantities of paving, curb and gutter stone, as necessary and proper for the further and entire performance of said work. And that at the time of making the contract aforesaid, the said representations of the defendants were each of them untrue, and that no petition, as by them represented, had been presented to them, and they had no authority to cause any assessment for the expense of such improvement to be laid or collected, and could not and did not confer any right or authority upon the plaintiff, to enter on the said street for the performance of said work to be performed by the plaintiff, and that they

subsequently, upon a petition signed by one-third of the owners of lands on said street, entered into a new contract with one John Cassidy, for the making of such improvement, and that the defendants have not made, (although a reasonable time for that purpose has long since elapsed,) and cannot make, any assessment for the payment of any damages or compensation to the plaintiff, on account of the contract made by him as aforesaid, and the matters above set forth. And the plaintiff claimed to recover against the defendants the sum of $10,000, on account of the matters aforesaid, and he prayed judgment for that sum and costs.

The reply was a general denial of the matters set forth in the answer. The referee to whom the cause was referred, dismissed the complaint; and from the judgment entered on his report, the plaintiff appealed.

J. L. Campbell, for the appellant.

Samuel E. Johnson, for the respondent.

BIRDSEYE, J. The powers possessed by the common council of the late city of Williamsburgh to open, regulate, grade and pave streets &c. instead of being general, were by the law conferring those powers, made subject to certain important "restrictions and limitations." (*See* "*Act to incorporate the city of Williamsburgh*," *Laws of* 1851, *p.* 110; *and tit.* 4, §§ 1, 2 *&c. p.* 128.) No proceedings could be taken to open, regulate, grade or pave any street or avenue, unless upon petition signed by one third of the persons owning land situated within the assessment limits, which were to be fixed in the manner directed by the act. Upon the presentation of a petition so signed, public notice was to be given that such application had been made, and of the time, (which was not to be less than thirty days after the first publication of the notice,) when the common council was to proceed on the petition. If a remonstrance was presented, signed by a majority of the persons who would be assessed for the expense of the improvement, nothing farther

could be done. If no such remonstrance was presented, they might in their discretion allow the improvement petitioned for tc be made.

I find no other power to open or regulate streets, conferred on the common council of that city; nor were we, at the argument, referred to any other provisions of law on the subject. In this respect the present case differs altogether from the cases presented in *Cumming* v. *The Mayor &c. of Brooklyn*, (11 *Paige*, 596;) *Maunice* v. *The Mayor &c. of New York*, (4 *Seld.* 120;) and *Wetmore* v. *Campbell*, (2 *Sand. S. C. R.* 341.)

In the first of these cases, the chancellor says that the corporation of Brooklyn having the general powers of a corporation, were competent to enter into the contract they had there made with the complainants. That the fortieth section of the city charter, (*see Laws of* 1833, *p.* 105,) gave *a general authority* to the common council to cause streets and avenues to be graded, paved &c., and that there was nothing in the charter which prohibited the corporation from entering into contracts for the making of such improvements. The same powers are possessed by the common council of New York. (*See* 2 *Sand. S. C. R.* 344; 4 *Seld.* 130; *section* 175 *of Act of April* 9, 1813; *Davies' Laws relative to New York cit p.* 526.)

Instead of conferring similar general powers on the common council of Williamsburgh, the legislature thought fit to make them, in regard to these local improvements, but little more than the agents of the owners of the adjacent lands. No proceedings could be initiated except by the consent, and upon the petition, of one third of the persons owning the lands on which the expenses of the improvement would be assessed. If a majority of the persons to be assessed for the expenses of the improvement, remonstrated against it, nothing further could be done. These provisions of law were public. The plaintiff is as much bound by them as were the authorities of the city. All the preliminary proceedings, leading to the determination of the common council to make the improvement in question, were also matters of public record in the office of the city clerk. As such, they

were accessible to the plaintiff, and he is fairly chargeable with notice of their contents. If, as he alleges in his complaint, no petition whatever had been presented by the owners of the property to be benefited by this improvement, and thus the first step for obtaining jurisdiction had not been taken, the slightest diligence in examining the proceedings relative to this improvement, in the city clerk's office, would have shown him the illegality and invalidity of the whole proceeding. No excuse for the failure to make these inquiries is suggested.

If the plaintiff can recover on the state of facts he has stated in his complaint, the "restrictions and limitations" which the legislature sought to impose upon the powers of the common council, will go for nothing. And yet these provisions are matter of substance, and were designed to be of some service to the constituents of the common council. They were intended to protect the owners of lands, and the tax payers of the city, as well against the frauds and impositions of the contractors who might be employed to make these local improvements, as against the illegal acts of the common council themselves in employing the contractors. But if the plaintiff can recover in this action, of what value or effect are all these safeguards? If the common council desire to make a local improvement, which the persons to be benefited thereby and to be assessed therefor, are unwilling to have made, the consent of the owners may be wholly dispensed with, according to the plaintiff's theory. The common council have only to "represent" that the proper petition has been presented, and the proper proceedings have been taken, to warrant the improvement. They then enter into the contract. The improvement is made. Those other safeguards, for an assessment of the expenses, and for reviewing the proceedings, may or may not be taken. But when the work is completed, and is to be paid for, it is found that the common council have no authority to lay any assessment, or collect a dollar from the property benefited by the improvement. The contractor then brings his action, and recovers from the city the damages he has sustained by the failure of the city to pay him the contract price

The ground of his action is the falsity of the representation made to him. But the truth or falsity of such representations might have been ascertained by the party, with the use of the most ordinary care and diligence. The existence of the proper petition, and the taking of the necessary initiatory steps to warrant the improvement were doubtless referred to and recited in the contract made with the plaintiff. And he thus became again directly chargeable with notice of the contents of all these papers.

It is obvious that the restrictions and limitations imposed by law cannot thus be evaded. The consent of the parties interested in such improvements cannot be dispensed with; the responsibility which the conditions precedent created by the statute impose, cannot be thrown off in this manner. For the effect of so doing is to shift entirely the burden of making these local improvements; to relieve those on whom the law sought to impose the expense, and to throw it on others who are not liable, either in law or in morals.

The principle of this assessment law, and of every other assessment law of the state for similar local improvements, so far as I now recollect, is to charge the expense of the improvement on the property to be benefited thereby. But the result of the rule sought to be established in this action would relieve that property, and make the expense a charge on the general funds of the city; to be collected by tax on all the property of the city. It would be useless to dwell on the temptations to fraud and wrong which such a rule would hold out to the owners of property requiring improvement. Whether such owners should seek to throw their own burdens on the shoulders of the public, by seeking an election to the common council and making the false representations, or by becoming contractors, and acting on such representations, is of no consequence. The statute charged the expense of the opening of North-Seventh street on the owners of the adjacent lands. The plaintiff seeks to impose that expense on the tax payers of the city generally. He is not entitled to the help of this court to effect that purpose

It is not intended to express any opinion as to what the rights of the parties would be, if the false representations of the common council had concerned some subject which was exclusively within their own knowledge, or as to which the plaintiff had no means of acquiring information, and was chargeable with no notice, and no want of diligence in failing to obtain sufficient information on which to base his dealings with the city.

The judgment appealed from must be affirmed, with costs.

EMOTT, J., concurred.

S. B. STRONG, P. J. This is a hard case for the plaintiff, who, no doubt, acted upon the supposition that the corporation had the requisite power to make the contract.

It is unnecessary to decide whether one can recover damages from the corporation of a city by reason of the false or fraudulent representations of the common council. The difficulty in this case is that the common council transcended its powers, and therefore the corporation was not bound by their acts.

The judgment should be affirmed.

[DUTCHESS GENERAL TERM, April 14, 1857. *S. B. Strong*, *Birdseye* and *Emott*, Justices.]

SMITH *vs.* CROUSE

Where a party, on appealing to the county court from the judgment of a justice of the peace, for the purpose of staying execution of the judgment, executes an undertaking, with sureties, conditioned that "if judgment shall be rendered" against the appellant, and execution thereon be returned unsatisfied in whole or in part, the obligors will pay the amount unsatisfied, and the county court reverses the judgment of the justice, and on appeal to the supreme court, that court, at general term, reverses the judgment of the

county court and affirms that of the justice, with costs, the sureties are liable not merely for the amount of the judgment in the county court, but for the amount recovered in the supreme court.

H. *A. NELSON*, for the plaintiff.

J. V. W. Doty, for the defendant.

By the Court, BIRDSEYE, J. This case is a controversy submitted without action, pursuant to sections 372–4 of the code of procedure. The facts out of which the question of difference arises, are the following.

The present plaintiff brought an action in a justice's court, against one Morris S. Traver, and recovered judgment against him for $25 damages, together with costs of the suit. From such judgment Traver appealed to the county court of Dutchess county. In order to stay the issuing of execution on the judgment, Traver and the present defendant, Crouse, united in an undertaking, which, after reciting the judgment and appeal, proceeds as follows: "Now therefore, for the purpose of staying the execution of the said judgment, we, Morris S. Traver and Tilley Crouse, as sureties, undertake, jointly and severally, that if judgment be rendered against the said Morris S. Traver, appellant, and execution thereon be returned unsatisfied in whole or in part, we will pay the amount unsatisfied." This undertaking was duly presented to the justice, at the time of the appeal, and was duly approved by him.

The said action, between said Smith and Traver, was argued in the county court, and the judgment of the justice's court reversed with costs. Smith thereupon duly appealed from the judgment of the county court, to the general term of the supreme court, which court reversed the judgment of the county court, and affirmed the judgment of the justice's court, and thereupon judgment was duly entered, in accordance with the decision of the general term, and for $107.91, interest, costs and disbursements, besides said $25, the original judgment; and an execution upon said judgment was duly issued against

the property of said Traver, and duly returned by the sheriff wholly unsatisfied; and the whole amount of said judgment still remains due and unsatisfied. The plaintiff in this action claims that Crouse, the defendant herein, is liable on his bond for the amount of such judgment, damages and costs. The defendant insists, first, that he is not liable at all; and second, that, if liable at all, he is liable only for the judgment and costs of the county court.

By the giving of the undertaking in question, the present defendant assisted in staying the execution of the original judgment of Smith *vs.* Traver. But for that act of Crouse, execution on that judgment would have been issued. As insolvency is not to be presumed, but rather the contrary, we must conclude that if this undertaking had not been given by Crouse, the judgment against Traver would then have been collected. Crouse has therefore no claim, in morals, to be released from liability on his undertaking, and should be held to make good at least the loss caused by the stay of execution, if his contract purports to create a liability therefor. Upon this point there can be no doubt. Judgment has been rendered against Traver, and execution thereon has been returned wholly unsatisfied. It was upon the happening of precisely these events, that Crouse undertook to pay the amount unsatisfied. Why should he not, then, fulfill his promise?

It is said that the judgment intended to be secured by the appeal was that of the county court of Dutchess county; and that no judgment of that court has been rendered against Traver. If that was the intention of the parties to the undertaking, why was it not expressed? Why were not the words, "in the county court," inserted after "rendered," in the undertaking? The words used in the undertaking are broad enough to include any judgment which might be rendered against Traver in that action, whether in the county court or this court.

But it is obvious that there was never any *intention* on this point, in the minds of the obligors, or rather, that they intended to comply with the statute which prescribes the form of this security. (*Code*, § 356.) They have adopted the very words

of the enactment. And the true question is, what is the conconstruction of the statute? rather than what is the construction of the undertaking, or what is the agreement of the parties? The obligors and obligee never had any agreement—any meeting of minds—on the subject. The latter recovered his judgment; and the former, availing themselves of the privilege extended by law, obtained a stay of execution on the judgment, by giving the undertaking which the law had prescribed.

It seems obvious then, that the legislature in using, in the statute, words sufficiently broad to charge a party under circumstances like the present, meant to include all that fairly comes within the terms employed. Full effect should be given to the plain intention of the legislators. We must presume that they foresaw that just such a state of facts must not unfrequently occur, as are presented in this case. As they have adopted a form of expression so general as to provide for this case, how can the court say that they intended something less than that—something which would render every judgment of a justice's court less valuable, by the temptations that would be held out to litigation and strife. For such would certainly be the result of the construction here contended for by the defendant.

As, then, there is a legal liability against the defendant, and also a moral obligation, certainly to the extent of the judgment of the county court, if it had been what it should have been; is there any method by which the recovery to be had in this action can be restricted to the amount of what should have been the judgment in the county court? I see none. The liability of the defendant is an entire one. It is to pay so much of the judgment that may be rendered against Traver, as shall be unsatisfied on execution. There is no way of ascertaining what would have been the amount of the judgment of the county court, had it been a judgment of affirmance. Had the judgment of the county court been *against* Traver, then the condition of the undertaking would have been broken, and his surety would have been charged; and, probably, in case of a further appeal by Traver, Crouse would not have been liable for

the costs of that appeal. But, since the decision of the general term of this court, reversing the judgment of the county court, there is no judgment of the county court. That which was such a judgment has been reversed—has ceased to be—is held for nothing. No breach of the condition of the undertaking occurred, till the judgment of this court was rendered, and the execution thereon was returned unsatified. When the breach occurred, then the liability of the defendant became commensurate therewith; and he cannot claim to have it limited to a part, which cannot be measured or judicially ascertained, even though under another state of facts, that might have been the extent of his liability. Besides, the moral duty of indemnifying the plaintiff against the consequences which resulted from the defendant's giving the undertaking, will be found to extend, I think, to the costs of the appeal to this court. Those costs have been incurred by the plaintiff, it is true, by reason of the erroneous decision of the county court. But, in all probability, that court would have given no judgment, as there would probably have been no appeal to it, but for the stay of execution which Crouse obtained by joining in this undertaking.

I think judgment must be rendered in favor of the plaintiff against the defendant for the sum of $132.91, being the amount of the judgment of the general term of this court, in the case of Smith *vs.* Traver, together with interest thereon from the rendition of that judgment.

The parties have stipulated that neither shall have costs or disbursements against the other.

[Dutchess General Term, April 14, 1857. *S. B Strong, Emott* and *Birdseye*, Justices.]

24 438
4h 416

DEUEL *vs.* RUST.

The preliminary affidavit, in summary proceedings to recover the possession of demised premises, under the statute, must make out a plain case, and show the relation between the parties to be that of landlord and tenant.

The summons, besides describing the premises, should require the defendant forthwith to remove from the same, or show cause why possession of said premises should not be delivered to the applicant. It should also be directed to the tenant, by name.

In order to perfect an appeal to the county court from the decision of a justice, in proceedings of that nature, security must be given.

Notice of appeal must be given in the manner provided by § 354 of the code. Security for the judgment must be given, in the form prescribed by § 356 of the code, which must be approved by some officer formerly competent to allow appeals to courts of common pleas. And, in addition to this, in case of an appeal by the tenant, in order to stay the issuing of the warrant or execution, security must also be given for the payment of all rent accruing or to accrue upon the premises subsequent to the application to the justice.

If security is not given, on appeal to the county court, no appeal is properly taken, and the proceedings are not removed to that court. Consequently the county court has no jurisdiction of the case, either to affirm or reverse the judgment of the justice and can render no valid judgment, except to dismiss the appeal.

The judgment of the county court, in such proceedings, is not capable of being reviewed by way of appeal. It is *final* in the sense of being *ultimate and conclusive;* at least so far as review by the supreme court, upon appeal, is concerned. BIRDSEYE, J., dissented

APPEAL from a judgment of the county court of Dutchess county reversing the judgment of a justice's court, in summary proceedings for the removal of the defendant from the possession of demised premises.

W. S. Eno, for the appellant.

G. W. Paine, for the respondent.

By the Court, BIRDSEYE, J. A more remarkable succession of errors than is exhibited in this case, it would be difficult to imagine. The affidavit of the plaintiff altogether fails to show, except by a mere implication, any of the facts authorizing the removal of the defendant from the premises. It

cannot be gathered from the affidavit, whether the defendant was a tenant or lessee, at will or at sufferance, or for any part of a year, or for one or more years. And yet, unless he came within one or another of these descriptions, he could not be proceeded against under this statute. It does not appear that the relation of landlord and tenant existed between the parties at all. If it be sufficiently averred that the defendant ever did rent the premises, it does not appear that he rented them of the plaintiff, or went into possession as his tenant. If he did rent of the plaintiff, he may have rented for his own life, or for that of another person. Upon the affidavit it may be that the defendant rented the premises of some person other than Deuel, perhaps his tenant, who may have consented to his holding over, and may have had full right to give such a covenant, though Deuel would not and did not give it.

It has been properly held that in such proceedings the preliminary affidavit must make out a plain case, and show the relation between the parties to be that of landlord and tenant. (*Hill* v. *Stocking*, 6 *Hill*, 314. *And see Cunningham* v. *Goelet*, 4 *Denio*, 71; *Benjamin* v. *Benjamin*, 1 *Selden*, 388.)

The summons in the case is not such as is required by the statute. (2 *R. S.* 513, § 30, *as amended by chap.* 460 *of the Laws of* 1851.) It merely requires the defendant to "show cause why he *should not leave* the premises now occupied by him, belonging to Jay Deuel." The premises are not *described*. *Non constat*, but that the defendant may have occupied other "premises belonging to Jay Deuel," than the house and lot mentioned in the affidavit. The summons, besides "describing the premises," should have required the defendant "forthwith to remove from the same," or show cause "why *possession of said premises should not be delivered to said applicant*." The summons should also have been directed to the tenant by name, instead of being directed to any of the constables of the county. (6 *Hill*, 316.) If the defendant's tenancy was at will, or at sufferance, it does not appear to have been terminated "by giving notice in the manner prescribed by law." (*Ib.* § 31.)

The service of the summons was also irregular. Instead

of delivering to the alleged tenant a true copy of the summons, and at the same time showing him the original, the original does not seem to have been shown at all. It may be justly inferrible that a copy was shown to and read by the defendant, and not delivered to or left with him.

The proceedings at the return of the summons were also wholly irregular. Instead of waiting the one hour required by statute, (2 *R. S.* 233, §§ 44, 46,) the justice went away, and remained certainly more than an hour. It may have been only just less than two hours. Whether the defendant appeared at the hour fixed for the return of the summons, is not stated, though the justice says "the defendant was not present to his (the justice's) knowledge." Neither is there any certainty that the defendant did not appear within the hour after the time fixed for the return of the summons, and depart again, believing, from the absence of the justice, that the proceedings were abandoned. It would seem, therefore, that the whole proceeding before the justice was *coram non judice*, and void.

The justice, however, proceeded to render judgment, "that said defendant be turned from said premises," and for costs; and a warrant was issued to remove him. At this stage of the case the defendant sought to remove the proceedings by appeal to the county court. A notice of appeal was served, but no undertaking, bond or security was given; and no affidavit of the appellant, or any one in his behalf, was served. The defendant contends that no security was required. Upon an examination of all the provisions of section 5 of chap. 193, p. 292, of the laws of 1849, (*see* 2 *R. S.* 757, 760, §§ 51–53, *4th ed.*) I entertain no doubt that security must in all cases be given to perfect an appeal from the decision of a justice of the peace in such summary proceedings. It is true the statute provides that such proceedings "may be removed by appeal to the county court of the county, in the same manner, and with the like effect, and *upon like security* as appeals from judgments of justices of the peace in civil actions." It is true, also, that when this act was passed, on the 3d of April, 1849, the *manner* of appealing, as prescribed by sections 303, 304, of

the code of 1848, was to prepare an affidavit on the part of the appellant, stating the substance of the testimony and proceedings before the court below, and the grounds upon which the appeal was founded; to serve a copy of the affidavit, with a notice of the appeal and of argument, on the respondent or the justice. And no security was required to be given, unless the appellant desired a stay of proceedings on the judgment. The provision as to security on appeals to the county court from judgments of justices' courts in civil actions is still the same; the giving of security being optional with the appellant, and being required only when a stay of execution is desired.

The alterations made in the method of appealing from the justice's court to the county court, by subsequent statutes, clearly apply to the manner of appealing in the summary proceedings under the act of 1849. The statute which then required appeals to be taken by the making and service of an affidavit, and the service of a notice of appeal and of argument, has been repealed. It is gone entirely. It cannot be retained for one purpose and abrogated for all others. Since its repeal, and the substitution in its place of other provisions of law, it has, except as to rights vested before its repeal, no more vitality than if it had never been enacted. There was, therefore, in this case, no need of the affidavit stating the testimony and proceedings before the court below, and the grounds of the appeal. And were there no other provisions on the subject, there would have been no necessity for giving security on the appeal, unless a stay of execution had been desired. But sub. 3 of § 5, of the act of 1849, (*Laws of* 1849, *p.* 293, *and* 2 *R. S.* 760, § 53. *4th ed.*) expressly provides that "no appeal shall, under this act, be allowed, unless *such* security for said judgment shall be given and approved by the judge at the time of allowing such appeal, and served on the justice with the affidavit for appeal." The words, "such security for said judgment," here, obviously refer to the "security" mentioned in the first sentence of the preceding subdivision, 2d of the same section, and which is also mentioned in the first clause of the second sentence of the same subdivision. "Such security" is different from the further

"security" for the subsequently accruing rent, which in case of an appeal by the tenant, is required by the last sentence of the subdivision, to be given, "in addition to the security for such judgment."

Taking the whole statute together, then, and reading it in connection with the other statutes on the subject of appeals from justices' to county courts, I think the method of appealing will be as follows: The notice of appeal must be given in the manner provided by section 354 of the present code. "Security for the judgment" must be given, in the form prescribed by section 356 of the code, which, it would seem, from sub. 3 of § 5, of the act of 1849, must be approved by some officer formerly competent to allow appeals to courts of common pleas, (2 *R. S.* 258, § 191, [187,]) although no allowance of the appeal itself is now necessary. In addition to this, in cases of an appeal by the tenant, in order to stay the issuing of the warrant or execution, security must also be given for the payment of all rent accruing or to accrue upon the premises subsequent to the application to the justice.

As no security, whatever, was given in the present case, no appeal was properly taken, and the proceedings were not removed to the county court; consequently, that court had no jurisdiction of the case, either to affirm or reverse the judgment of the justice. The motion to dismiss the appeal, which was made and denied, should have been granted. The judgment subsequently rendered was void, for want of jurisdiction. But it is said that whatever may have been the judgment of the county court, it was *final*, and cannot be reviewed here. The 2d subdivision of the 5th section of the act of 1849, declares that on the appeal in such summary proceedings, the decision of the "county judge shall be an affirmance or reversal of such judgment, *and be final*." Perhaps the most obvious meaning of this provision is, that the judgment of the county court, in such a case shall not be subject to review in this court. That interpretation is, however, not quite satisfactory to my own mind. By section 317 of the code of 1848, in case of an ordinary appeal to the county court, that court might either order

a new trial, or might affirm or reverse the judgment of the court below, in whole or in part, and as to any or all the parties. The same provisions, in substance, are contained in section 366 of the present code. Under these provisions the county court might, when the act of April 3, 1849, was passed, and may still, render judgments upon appeal from justices' courts, which are *not "final;"* that is, which do not declare, ultimately, without further judicial examination, the rights of the litigants.

The power of ordering a new trial, thus conferred upon the county court, was wholly new. Previously they could, in similar cases, only "affirm or reverse the judgment, in whole or in part" (2 *R. S.* 257, § 185, 181.) It may well be supposed, that in 1849, in passing the new act as to these summary proceedings, the legislature would have in view the usual power of awarding new trials thus conferred on county courts, and would withhold such a power in proceedings designed to be *summary.* In these summary proceedings between landlord and tenant, therefore, no such judgment can be given. The decision, when given, must be "final;" not requiring further action in that court or the court below, in order to a final determination of the rights of the parties. But when the judgment of the county court has been given, it becomes one which may be reviewed in this court by appeal, under section 344 of the code. For there seems to be good ground for the opinion that although these proceedings to recover the possession of land, under art. 2 of title 10 of chap. 8 of part 3 of the revised statutes, are, as they are declared to be, *summary*, yet they come within the definition of *civil actions*, as defined by the code, §§ 2, 4, 5, 6. Chapter 8 of the 3d part of the revised statutes does, indeed, relate to "proceedings in special cases;" and among these "*special cases*" are these "summary proceedings to recover the possession of land in certain cases." But the same chapter regulated the bringing and maintaining of suits by poor persons, as well as proceedings by and against infants, and suits by and against executors and administrators and against heirs, devisees and legatees, and suits against sher

iffs, surrogates and other officers, on their official bonds, and actions for penalties and forfeitures, &c. And no one will doubt that all these proceedings are *actions*, within the definition of the code; nor that they are to be "conducted in conformity to" the code. (§ 471.)

Although the proceedings in the case now before the court are "*summary*," and are given and regulated by the same chapter, I am disposed to think that, since the act of 1849, giving jurisdiction of such cases to justices of the peace, and directing them to "render judgment," according to the finding of the jury, or, if no jury be called, according to their own final decisions, and to "include in such judgment the costs of such proceedings to the prevailing party," and allowing the review of such judgments by the county court, the proceeding at least when taken before a justice of the peace, becomes "an ordinary proceeding in a court of justice, by which a party prosecutes another party, for the enforcement and protection of a right, or the redress or prevention of a wrong." It is, therefore, a *civil action*, under sections 2 and 6 of the code. And by sections 8 and 344, the judgment of the county court in such a proceeding is subject to review, on appeal, in this court.

Where, however, the proceedings are not before a justice of the peace, under the act of 1849, the magistrate is not required to enter any "judgment," but simply to issue his warrant for the removal of the tenant, (2 *R. S.* 514, § 33, *and* 515, § 39.) In such a case, the county court has no jurisdiction, and this court can review the proceedings only by certiorari, under the provisions of section 47 of the article of the revised statutes relating to these proceedings.

It will be said, I am aware, that the 471st section of the code is conclusive against this view. It is true, that section provides that *the second part* of the code shall not affect certain enumerated proceedings, among which are the proceedings provided for by chapter eight of the third part of the revised statutes, by which these summary proceedings are given. But the same section also provides that when, in consequence of

any of the proceedings there enumerated, "a civil action shall be brought," it shall be conducted in conformity to that act. The summary proceedings thus given are to result in a "judgment," a judgment, too, which any justice of the peace of the state may give, as to premises situated in his city or town. The justice is required to "enter in his docket" the finding of the jury, or in case no jury is called, his own final decision, "and render judgment therefor, and include in such judgment costs of such proceedings to the prevailing party, at the same rate of fees now allowed by law in (the then existing) civil actions in courts of justices of the peace and limited in like manner." (*Laws of* 1849, *ch.* 193, § 5, *subd.* 1.) The justice may direct the collection of such costs either in the warrant for the delivery of possession, or by execution issued by him. (*Id.*) The judgment thus rendered is, by the next subdivision, capable of being removed by appeal to the county court, in the same manner, and with the like effect, and upon like security as appeals from the judgments of justices of the peace in (other and then existing) civil actions. The county court is to decide such appeal by an absolute judgment, in favor of one party or the other. It would be singular if by this stage of the case, it had not acquired the character of "an ordinary proceeding in a court of justice, by which a party prosecutes another for the enforcement and protection of a right, or the redress or prevention of a wrong." If it has, it is to be conducted according to the code, and our jurisdiction attaches to review the proceedings on appeal. The fitness of our possessing and exercising such a jurisdiction will appear, when it is considered that the power to dispose of the possession of lands, and to adjudicate upon the rights of contending claimants to lands, is given to the most numerous class of magistrates in the state. These magistrates, too, are not usually men of legal education. They are, especially, unlikely to be familiar with the rules of law applicable to real estate. In no other case, to my recollection, are they authorized to adjudicate upon questions relating to real estate. And in no other class of "special" or "summary" proceedings, so far as I now recollect, is the magistrate

required to keep a docket, and render judgment, and award costs and collect the same by execution, and make return to appeals.

I reach the conclusion with no little hesitation; but I conclude, upon all these considerations that the provision of the act of 1849, directing that the judgment of the county court shall in a case like the present, "be final," means that it shall be absolute, in favor of the one party or the other, and shall require no further judicial action before it shall declare finally the rights of the litigants. No new trial can be awarded; but the judgment itself may be reviewed upon appeal in this court.

In this view of this question, however, my brethren do not concur, though they unite in the views above expressed, as to the proceedings previous to the judgment of the county court. They are of opinion that the judgment of the county court is not capable of review here by way of appeal. That it is *final* in the sense of being *ultimate and conclusive*, at least so far as our review by appeal is concerned.

This being the judgment of the court, the present appeal must be dismissed, but without costs.

[Dutchess General Term, April 14, 1857. *S. B. Strong*, *Birdseye* and *Emott*, Justices.]

Clarke *vs.* The City of Rochester.

24 446
29 450
39 443
46 300
4h 210
5h 312
5h 487
18a 44
26a 471
28a 605
57a 186

All the inherent power of the people for self-government, not delegated to the general government, is reserved to, and belongs to, the state.

Of such reserved powers the entire legislative power is vested in the state legislature, subject to no restrictions or limitations except such as are contained in the state constitution.

The taxing power belongs to the legislature, and is subject to no limits or restrictions outside of the United States and state constitutions.

The power to authorize the construction of works of internal improvement, and to provide for their construction by the officers or agents of the state, rests with, and pertains to the legislature, to be exercised within its exclusive jurisdiction.

Such works may be constructed by general taxation, and in case of local works by local taxation; or the state may aid in their construction by becoming a stockholder in private corporations; or authorize municipal corporations to become such stockholders for that purpose.

Rail roads are public works, and may be constructed by the state, or by corporations, and lands taken for their use are taken for the *public use*, and may be so taken, on payment of a just compensation.

The legislature is the exclusive judge in respect to what works are for the public benefit, and in regard to the expediency of constructing such works, and as to the mode of their construction, whether by the state or by private or municipal corporations in whole or in part.

The legislature may authorize municipal corporations to subscribe to the stock of a rail road company, with the consent and approval of a majority of the corporators, duly ascertained.

The passage of a law authorizing such subscriptions to the stock of a private corporation, subject to the assent or approval of a municipal corporation, by the vote of the corporators, is not a delegation of power to the corporation to pass a law, but is a legitimate case of conditional legislation, and is entirely within the discretion of the legislature.

The act to amend the charter of the city of Rochester, passed July 5, 1851, including the sections 285 to 291 inclusive, was a valid law immediately upon its passage and the signature of the governor thereto; and the provision therein that those sections should not take effect until approved by the corporation, merely suspended the power of the common council to act upon said sections until such approval. JOHNSON, J. dissented.

The acts of the city of Rochester, in subscribing for the stock of the Genesee Valley Rail Road Company, and in issuing the bonds of the city to pay for such stock, were legal and valid acts; and the city were entitled to take and hold such stock, or to sell it to individuals as valid stock, and is bound to pay the bonds so issued. And a purchaser of such stock cannot have his contract of purchase rescinded, on the ground of its invalidity.

APPEAL from a judgment entered at a special term, after a trial at the circuit, before his honor, WM. F. ALLEN, one of the justices of this court, without a jury. The facts are fully set forth in the opinions which follow.

E. Griffin, for the appellant. There is no dispute about the facts of this case. It is not pretended that the city of Rochester has done any thing more than the legislature intended to authorize. The only question presented on the trial of this cause, by the plaintiff's counsel was, whether the legislature had the right to delegate to the citizens of Rochester, as they

have done, in section 209, the power to accept or reject the provisions in the previous sections of the act. It was contended at the circuit that this delegation of power to the electors of Rochester, was unconstitutional, and the case of *Barto* v. *Himrod*, was cited. No question whatever was made by the plaintiff's counsel as to the power of the legislature to authorize the city to subscribe for the stock, and issue their bonds. It was merely contended that they had not done so. The question as or the general power of the legislature was never raised or discussed in the court below. The court, however, did decide against us upon that point, as well as the one raised on the argument. It will, therefore, be our endeavor to show that the court below was mistaken upon all the grounds upon which the decision is based 1st. It is contended on our part, that the legislature had full power to authorize the city of Rochester, by their common council, to subscribe for 3000 shares of the capital stock of the Rochester and Genesee Valley Rail Road, and issue their bonds to pay for the same. 2d. That the legislature, by the act passed July, 3, 1851, amending the charter of the city, have conferred this power.

The determination of this cause requires the deliberate and careful examination of the powers of the legislative and judicial departments of our government. In this country, government is divided into three departments—legislative, judicial and executive. The legislature to pass laws, the judicial to construe them, and the executive to see that they are enforced. These departments are created entirely distinct, by the constitution, and the public good requires that they should be rigidly kept so. The constitution being the supreme law of the land, the judicial department is necessarily empowered tc construe it. A laudable desire to protect the citizen from the exercise of what the judges may consider a dangerous power conferred by the legislative department, has in some instances induced courts, by construction, to trench upon the powers of this department. That cities and towns have suffered from the exercise of such powers as are conferred upon the city of Rochester, must be admitted; and such considerations are apt

to have their influence upon the decisions of courts, in all such cases. A general sentiment pervades the community, that it is unwise and inexpedient to confer upon municipal corporations the power to engage in the construction of rail roads. This sentiment may be just, but the court will bear in mind, that the wisdom or expediency of a law is left solely and exclusively with the legislative department of our government. No other department has a right to interfere with the exercise of the power to pass laws. If the legislature pass a law, no other department can gainsay or deny its wisdom or expediency; as long as the law remains in force, it is wise and expedient. Every law passed by the legislative department is presumed to be constitutional; and all courts are bound to approach the examination of every question involving the constitutionality of a law, under the influence of such a presumption. (1 *M'Cook's Ohio Rep. N. S.* 82.) It should be the wish and anxious desire of all courts, to uphold and sustain the authority of the legislative department. A decent respect for the opinions of so numerous and intelligent a body of men as our legislature, would induce such a desire. The ruinous consequences to result from pronouncing the law unconstitutional, should have controlling influence with all courts, where there is any doubt or hesitation.

The rule which we contend for is this: That no law should be declared unconstitutional, unless the court, starting with the presumption that it is constitutional, should become satisfied, *beyond any doubt or hesitation, that* it was *clearly, plainly and palpably unconstitutional.* We contend that this is the only reasonable and safe rule, and that it is supported by the decisions of every respectable tribunal in this country which has ever pronounced an opinion upon the subject. (6 *Cranch*, 87, 128. 4 *Dallas*, 14. 3 *Ser. & R.* 178. 12 *id.* 339. 4 *Binney*, 123. 4 *Wheat.* 518. 1 *Cowen*, 550. *U. S. Dig. vol.* 1, 553, *and cases cited.* 1 *M'Cook's Ohio Rep. N. S.* 82.) We say that the legislature, when acting within the scope of the legislative department, can rightfully pass any law not expressly prohibited; and we might safely rest this decision

upon the inability of our opponents to produce any such prohibition. If the framers of the constitution mean to restrain the legislature in the exercise of any particular power, they would plainly say so. They would leave no doubt on the subject. This prohibition is not to be made out by a process of reasoning, but by putting your finger upon the prohibition itself. (*Leiber on Civil Gov. ch.* 15, § 25. 2 *Barr*, 285. 2 *Rawle*, 374. 1 *Jones*, 61. *Hartman* v. *Commonwealth*, 5 *Harris*.) With all due deference to the course pursued by the ingenious and able judge who presided at the circuit, and pronounced the law under which the defendants have acted, unconstitutional, I submit, that he has departed from the well established rule, laid down by the sages of the law who have preceded him, and practically said that any law is unconstitutional which can by a process of reasoning be made plausibly to appear so. He has practically repudiated the plain, safe and well established rule, and adopted one eminently unsound in principle and unsafe in practice. Is the rule thus practically adopted by his honor, in this case, a safe rule, in the construction of constitutional powers? We think not, and trust that your honors, when you reflect upon the dangers which will result from the adoption of such a delusive standard or rule, if it can be called a standard or rule, will concur with us in this opinion. What then are the powers of the legislative department of our state government? We contend that the legislature of this state has a right to pass all laws not specifically prohibited by the constitution of this state, or of the United States. It has been said that the British parliament is omnipotent. It is omnipotent in this sense: it possesses the sunreme sovereign power of the state, or a power of action pncontrolled by any superior. The powers of government were, by the revolution, devolved upon the people of this state or colony. By that event the whole power of legislation, or the same power as the British parliament possessed, was devolved upon us. (1 *Bald.* 224. 8 *Wheat.* 584. 2 *Peters*, 656.) Our state constitution does not define the powers of the legislature. It merely created the legislative department. To enumerate and

define the powers of our legislature, would have been impracticable. If we would learn the extent of those powers, we must consult treatises on the subject of political science. (*Leiber on Civil Gov. ch.* 15, § 25.) The power to make laws resided, originally, with the people. By the adoption of the federal constitution, the people of this state parted with some of those powers. By the adoption of the state constitution they delegated the power to make laws to a senate and assembly, with certain limitations and restrictions. The second grantee, (if I may so express it,) would possess all the remaining power of the people upon such terms as they thought proper to grant it. These limitations and restrictions are to be construed strictly, and a liberal construction is to be adopted in regard to the powers claimed as granted by the state constitution, to the state legislature. The state stands upon the general grant. The rule is different when applied to the general government. The rule there is, that the constitution is to be construed strictly; for the obvious reason, that there is no general grant. They possess enumerated powers. They stand upon the enumeration. Deducting, therefore, the powers delegated to the general government, and the limitations specifically imposed by our state constitution, the legislature possess the same extent of powers as the British parliament, or any other legislative department in the civilized world. (21 *Wend.* 576. 1 *Hill*, 329. *Opinion of Judge Washington, in Golden* v. *Rice*, 3 *W. C. C. R.* 1 *Bald.* 74.) With these deductions, they are omnipotent in the same sense as the British parliament is omnipotent. They possess the sovereign power of the state, without control. When the people authorize any body of men to make laws, that body stands in the place of the people, and are supreme because the people are so. The question then is, does the constitution of the United States, or of the state of New York, forbid the legislature of this state to authorize the city of Rochester to subscribe for this stock, and issue its bonds to pay for it? There is no pretense that any thing in the constitution of the United States prohibits it. Government exercises power over the property of the citizen in two ways—by

taxation, and by taking the property of the citizen for public use, upon making a just compensation. In no other way can government lawfully touch it. The power to contract this debt, if upheld at all, must be under the taxing power. The right of eminent domain has clearly nothing to do with the case. Taxing property is not taking it for public use. The property taxed remains the property of the owner, subject to the burden imposed by the tax. (3 *Com.* 419.) 1. We will consider whether the legislature are restricted by any thing in the constitution, from granting the power to the city of Rochester, to subscribe for this stock, and issue their bonds. 2. Whether the use to which the money was to be applied, was a public use or purpose.

I. Section 9, article 7, of the state constitution, is as follows: "*The credit of the state shall not, in any manner, be given or loaned to, or in aid of any individual association or corporation.*" This provision does not prohibit the state from building a rail road, or subscribing for its stock, if the legislature should think that the public interest would be promoted thereby. The provision is plain, and merely extends to the *loaning of the credit of the state. The aid prohibited* is the *loaning or giving the credit of the state.* If the framers of the constitution meant to prohibit the building of rail roads, or subscribing for stock, they would have said so. They well knew that the state had suffered by the loaning of its credit to rail roads, and the provision was intended to guard against such consequences in future. Section 10 authorizes the state to borrow money to meet casual deficits, to the amount of one million. Section 11 authorizes the raising of money to repel invasions, suppress insurrections, and defend the state in war. Section 12 authorizes the contracting of any debt by a law, for any single work or object, to be distinctly specified therein. Such law shall also provide, by tax, for the payment of interest, and also the principal in 18 years. But no such law shall take effect until submitted to the people at a general election, and approved by a majority of their votes. These are all the provisions in the constitution limiting the power of the state legislature in rais-

ing money. These provisions are intended to restrict the power of the legislature in raising money for the state itself, having nothing to do, as I apprehend, with the right of the state, by legislative enactments, to enlarge the powers of municipal corporations. That the legislature has the right to authorize municipal corporations to raise money for certain purposes cannot be denied. Our statute books are full of this class of laws. They have lately authorized the city of Rochester to issue their bonds and raise money by their sale, for the construction of bridges over the Genesee river. It is quite obvious that these provisions of the constitution were never intended to apply to municipal corporations. The whole scope and object of these sections, and the express language used, clearly forbid any such idea. They *clearly, plainly and palpably, without any doubt or hesitation*, are limitations of the power of the state, when raising money for the state itself. How these provisions can be used as they have been, by his honor, the circuit judge, to sustain the idea that the legislature had not the power to pass the act under which the city of Rochester has issued its bonds, and subscribed for this stock, is beyond my comprehension. But the 9th section of the 8th article of the constitution contains the following: "It shall be the duty of the legislature to provide for the organization of cities, and incorporate villages, and restrict their powers of taxation, assessment, borrowing money, contracting debts and loaning their credits, so as to prevent abuses in assessments, and in contracting debts by such municipal corporations." This is, as we suppose, the only provision in the constitution at all applicable to municipal corporations, or which at all affects the question now before this court. His honor, the circuit judge, considers this a constitutional prohibition. We regard it in quite a different light. We suppose that this provision was placed in the constitution, by its framers, with full knowledge that the legislature then possessed, and would continue to possess and exercise, the power of authorizing municipal corporations to contract debts and borrow money for any public use, and for the sole purpose of having guards against abuse provided, when they did grant the power.

Until 1853, the legislature passed no general law in obedience to this provision. Up to that time they acted upon each particular case as it arose. When any municipal corporation applied to raise money, or loan their credit, the legislature granted the application with such guards against abuse as they thought proper. They usually provided that the question of raising the sum fixed by them, should be submitted to the taxable inhabitants of the locality to be affected by the debt, and if two-thirds voted in favor of the law, the money was raised, otherwise not. The legislature, also, in all such cases, were careful to provide that the money thus raised should be applied to a specific purpose, and no other; and until wanted for that purpose that it might be loaned in a particular manner. During the years 1850, 1851, 1852 and 1853, there are numerous instances where the legislature authorized municipal corporations to raise money to be invested in the building of rail roads. Albany, Buffalo, Rochester, Oswego, Elmira, Poughkeepsie and many other cities and towns, were thus empowered to raise money. In all cases, the legislature provided, in case of a sale of the stock subscribed for, that the proceeds should be applied to the payment of the bonds. In these various ways the legislature, in compliance with this constitutional provision, intended to guard against abuse. In our case the legislature provided that the money which should be raised by a sale of the bonds should be invested in the stock of the Rochester and Genesee Valley Rail Road, "and employed and used in the construction of said road, and for no other purpose whatever." The city was bound to take 3000 shares of this stock, and see that the money paid for it was applied to the construction of the road, and for no other purpose. The legislature use the words *subscribe or purchase*, as equivalent terms. It is difficult to see how the city could comply with the requirements of the act in having the money applied to the construction of the road, without subscribing for the stock, or purchasing it of the company. It is obvious that it was never the intention of the city to become a speculator in stocks. When the constitution imposes upon the legislature a duty, without specifying the manner of per-

forming it, is not the mode and manner of doing it left exclusively with that body? The framers of the constitution knew that the wants of municipal corporations could not be foreseen or defined, and that, of necessity, the supply for those wants must be left with the legislature; and they therefore contented themselves with enjoining upon the legislature, in case they granted the power to raise money, to guard against abuse. Does this provision, contained in the constitution, as the circuit judge supposes, prohibit the legislature from giving power to the city of Rochester to subscribe for this stock and issue its bonds? Most certainly not? It contemplates that the legislature may grant such power, else why are they enjoined to guard against abuse in its exercise? Can there be any thing *more clear, plain, palpable, and beyond doubt or hesitation*, than this: That the framers of the constitution intended to leave to the discretion of the legislature the power to authorize municipal corporations to contract debts and raise money, with such guards against abuse as they thought proper? On the 21st of July, 1853, the legislature passed an act entitled "An act to *restrict and regulate* the power of municipal corporations to borrow money, contract debts and loan its credit." By this general law the legislature undoubtedly intended to comply with the constitutional provisions contained in the 9th section and 8th article. Instead of performing the duty as they had before done, for their own convenience they thought proper to pass a general law. This general law is an act to *restrict* and *regulate* the power of municipal corporations in borrowing money, contracting debts and loaning their credit. *Not to prohibit.* The legislature certainly did not suppose that they were, by this provision contained in the constitution, prohibited from granting power to municipal corporations for these objects.

Section 1 prohibits municipal corporations from giving or loaning their credit to, or in aid of any individual association, or corporation—using precisely the language of the constitution, in section 9, article 7. This section does not forbid subscriptions for stock, and if it did, could not operate upon previous grants of power. The section and act, although passed in obe-

dience to the constitutional requirement, does not possess the force of a constitutional provision. Any subsequent grant of power to do the thing prohibited, would necessarily operate as a repeal of this law. The subsequent provisions of this act fix the amount which can be raised by any municipal corporations, according to the valuation of the assessed property, not exceeding eight per cent thereon. The act further points out the manner of raising this money. In the judgment of the circuit judge, all these legislators, who have thus concurred in this long series of legislation, under this provision in the constitution, were entirely mistaken in its meaning.

We submit that there is no provision in the constitution prohibiting the legislature from granting to the city of Rochester, the power to subscribe for this stock, and issue their bonds for its payment. 1st. Not in the 7th article, because the sections have no application whatever to municipal corporations, but are solely applicable to the powers of the legislature when raising money for the use of the *state itself*. 2d. Not in the 9th section of the 8th article, because that is not a constitutional prohibition of the power, but a mere direction to the legislature to restrict and regulate the exercise of the power when granted, so as to prevent abuse.

II. The use or purpose to which the money was to be applied, was a public use or purpose. We admit that the legislature could not authorize the city of Rochester to issue its bonds, and raise money, to invest in manufacturing business, or any business of a private nature; and, his honor, the circuit judge, considers the building of rail roads a private business. Here we differ, and this is probably the turning point in this case. It is no part of the business of the legislature of this state to engage in private business, or to authorize any municipal corporation so to engage. It not being within the scope of the legislative department, no constitutional restriction was necessary. Government is instituted to carry on, and attend to, public business—not private. But the legislature, unless expressly restrained by the constitution, possess the power of taxing the property of the citizen, to any extent, for the purpose of engaging in the

construction of any works of public utility, or aiding individuals in the construction of any such works. (4 *Wheat.* 316.) Having a right to do the whole work, they may do, of course, a part, and in any way or manner which they think best. This power of taxation, they may transfer to a municipal corporation, for a similar purpose. All municipal corporations are created in the place of the state government, because they can more conveniently, and more judiciously legislate for the inhabitants of a particular locality, than the state legislature itself. We insist that all tax laws must be considered valid, unless they are for purposes in which the community taxed have palpably no interest; when it is apparent that the burden is imposed for the benefit of others, and where it will be pronounced so at first blush. (9 *B. Monroe*, 345.) It is a mistake to suppose that government was instituted for the sole purpose of keeping the peace, and securing life, liberty and property. It has other duties to perform, such as the establishment of schools and colleges, thereby diffusing the blessings of knowledge. So far has our state gone, and rightfully gone too, as to tax the whole community to pay the expenses of education itself. The citizens of Rochester are taxed about $50.000 annually for this purpose. It is also an ordinary exercise of the taxing power, by our state, to stimulate and increase trade and commerce, by the construction of roads, bridges, rail roads and canals, at the public expense. A rail road, although undertaken and constructed by a private corporation, is yet a public work or improvement. It is as much or more so, than a common highway or turnpike. *The ultimate use and benefit to the public, is the test, not whether the work is done by a private company.* The government may, and ordinarily does employ private agency in the construction of public works. They may associate and co-operate with private corporations, or individuals, in the construction of a public work. Having the *power to do the work*, government is the sole judge of the manner of doing it. Is not the public welfare and prosperity of the state promoted and greatly promoted by the construction of rail roads? Is not the public greatly benefited by the cheap and rapid transportation of passengers and property

on them? Is not the value of all articles sent to market enhanced thereby? Have they not opened new markets for many articles, before unsalable? Have they not greatly raised the value of land itself in all rural districts? Have they not increased the business in all places where they terminate and center? Have they not raised the price of land in all such localities? Is not Chicago, that inland wonder, indebted largely to rail roads for its rapid increase and prosperity? Is not Rochester itself benefited in a similar manner, and would not the sensible owners of real estate, in this city, willingly pay $300,000 rather than lose the benefits derived, and expected to be derived from the Valley Road? Judge Sutherland, in *Bloodgood* v. *The Mohawk and Hudson Rail Road*, says: "Rail roads, though made by private corporations, when designed for traveling and transportation, are great public improvements. They can be made profitable to the corporators only by affording the most liberal accommodations to *the public*. They are from their very nature devoted and exclusively devoted to *the public use*, upon such terms and conditions as the legislature, in their wisdom, think reasonable and proper, in order to insure the owners of the stock an adequate remuneration for the hazard and expense incurred in their construction." (14 *Wend.* 57. 3 *Paige*, 45, 73, 74. 9 *Harris*, 169, 170. 1 *Bald.* 223. 2 *Peters*, 253. 1 *McCook*, 94, 5.) The same language is used by the chancellor in his elaborate and able opinion in the case, (3 *Paige*, 71.) The general rail road act declares all land taken by private corporations for the use of a rail road, taken for public use. Canals, bridges, roads, and other artificial means of communication have been made by the sovereign power at the public expense, in every civilized nation, in ancient and modern times, and we deem it quite unnecessary to cite authorities in support of the practice. Is his honor right, then, when he classes rail roads with manufacturing and mercantile business of a private nature? Is there no difference between them? We think there is, and that we have established, both from reason and authority, that rail roads are great public works or improvements, in which the state or municipal incorporation may engage at the public expense

III. The legislature, by the passage of the act of July 3, 1851, amending the charter of the city of Rochester, has fully conferred upon the city the power to subscribe for this stock, and issue their bonds to pay for the same, provided two-thirds of the electors voted for it. We contend that this is the passage of an act *in presenti* to take effect *in futuro*, upon a contingency, to wit: the vote of two-thirds of the electors of the city accepting the power offered, and that this contingency has happened. This act is similar to many others passed by our state legislature, conferring power on municipal corporations, to raise money to be used in the construction of rail roads and other public works. It is alleged, that our act was never passed; that it was left to the people of Rochester to pass it, and that such delegation of power renders the act unconstitutional. We do not contend that the legislature can surrender any portion of its legislative power, or delegate it. The legislature are made by the constitution the agents of the people, to perform a duty which requires great knowledge and the exercise of much discretion and judgment—according to general principles of law, without any reference to the provisions of the constitution. Such agents cannot delegate their power. The safeguards of the constitution are intended for the protection of the whole people, the minority as well as the majority. If legislative agents can cast off this power and direct others to perform their duty, the protection intended for the people will be gone. *This is plain.* But we hold that it is equally plain, that the legislature, having in due form passed an act with all its provisions, may make that act to take effect upon a contingency, and that this contingency may be fixed in the law itself. All laws range themselves under two heads, viz: those which prohibit or forbid the doing of any act, and those which authorize or permit the doing of an act. Our law belongs to the latter class. In all cases of that kind, it is in the discretion of the person or corporation authorized or permitted to do the act, to decide whether the law shall take effect and become operative. Counties, towns, cities and school districts are authorized by the legislature to raise money for various purposes, provided a

majority of the inhabitants vote to have it done. Until this vote, the laws thus passed do not take effect. They remain dead and lifeless on the statute book. Laws have also been passed, authorizing rail roads to consolidate, upon the vote of the stockholders; and until this vote was had there could be no consolidation—the act remains inoperative. In our case, no discretion is left with the citizens of Rochester, in regard to the provisions of the law. The manner and amount of subscription is fixed by the law as passed by the legislature. The mode of raising the money, by the issuing of bonds to pay for this stock, is also fixed. The number of directors which the city are to elect is fixed. The manner of using the money raised, by a sale of the bonds, until needed to pay for the stock is also fixed. The manner of obtaining the assent of the citizens of Rochester to the acceptance of this law, is also fixed. This is all done in the form of an act passed according to the prescribed forms, by the legislature, and this act is declared to take effect immediately. The law is then signed by the governor, and according to the provisions of the constitution then becomes a valid law. The law is thus complete, so far as its passage is concerned, and the discretion, or right to vote, relates only to its execution. It may be used, or carried into execution, or not, as the citizens of Rochester think for their interest. If they choose to carry it into execution, it must be done as it comes from legislative hands. Those who vote are not authorized in any manner to alter this law. Here is no delegation of power to make any law, which means a power to fix its terms, but mere authority to say when a law already made shall be carried into execution. The distinction between power to make a law and the power to say when it shall be carried into execution, is plain and palpable. The power to do the first cannot be delegated to the people at large, but the power to say when such acts as ours shall be executed, must necessarily be left to the body authorized to carry out the act. It is not the vote of the citizens of Rochester that makes or in any manner alters the law, but the law which makes the vote and fixes every thing to be done under it. It is a perversion of

terms to say, that any act which confers the power of voting is not passed. The law which thus confers the power of voting is said to be passed by the very vote given under the law and in pursuance of it. This seems quite absurd. The vote showed the assent of the citizens of Rochester to the acceptance of the law, and let it be remembered, that the legislature had no power to give this assent. The power to assent rested with us, and how can it be said that the legislature delegated a power which they never possessed? They fixed the manner in which our assent should be given This they had a right to, and it was all they could lawfully do. The free school act was passed in 1849, and was to go into effect the first of January thereafter, provided a majority of the people voted for it. The tenth section of the act provides, that *the act shall not become a law*, unless the electors, by a majority, vote for it. Here, say the courts, is a clear delegation of power to pass this law; but in our case, the law was complete and perfect, declared to take effect immediately. Certain portions were not to go into operation, except upon a contingency, viz: that two-thirds of the electors should vote to have it. If the legislature had entirely omitted the 291st section, the law would not have gone into operation, except upon a contingency, viz: the vote of the common council; but, would not the law have been passed without such vote? All the legislature have done is to fix upon a different contingency, viz: the vote of the electors. In the case of the free school law, the legislature had a right, (which they subsequently exercised,) to pass a law compelling the state to act under it. Not so in our case: they could merely offer us the power or authorize the citizens of Rochester to subscribe for this stock, and issue these bonds, if they chose. It was not any part of the duty of the legislature to decide for the citizens of Rochester in regard to the acceptance of this offer. All powers granted to municipal corporations are necessarily of the same character, depending upon the voluntary acceptance by the corporation. In this case, the legislature, aware of the constitutional injunction, contained in the 9th section, article 8th, thought proper to guard against abuse, by referring the acceptance to the people. In the case

of *Barto* v. *Himrod*, (4 *Seld.* 490,) Judge Ruggles, says: "*a statute to take effect upon a contingency must be a law in presenti, to take effect in futuro.*" Is not our law, one expressly declared to be a law *in presenti*? Does it not take effect upon a future event? When the legislature fixed that future event, did they exceed their powers? The expediency of exercising the power offered, necessarily in all such cases, rests with the corporation to whom the power is offered. The expediency of offering the power, (being all they can do in such a case,) rests with the legislature. The vote of the electors giving their acceptance, thus provided the occasion, or supplied the contingency, upon which the common council could act. The vote did not pass the law, but furnished the contingency. The legislature are required by the constitution to provide against abuses in raising money by municipal corporations, and will any one say that a reference of the acceptance of such a power to the people, is not a judicious and wise performance of their duty? No legislative power was thus delegated to the citizens of Rochester, and their voting cannot be called legislation. The following authorities, in addition to those cited in *Johnson* v. *Rich*, (9 *Barb.* 680;) namely, *Mooers* v. *The City of Reading*, (9 *Harris*, 188;) *The Cin. Will. and Zanesville Rail Road* v. *The Commissioners of Clinton County*, (1 *McCook*, 77;) and *Slack* v. *Maysville and Lexington Rail Road*, (9 *B. Monroe*, 526,) furnish all that can be desired on this question. The case of *Barto* v. *Himrod* is, of course, to be considered the law of the land. It has been pronounced by the supreme judicial power of the state, and I respectfully bow to its mandate. That case, if a delegation at all, was to the whole people, obviously turned upon the express declaration contained in the 10th section, "*that it should not become a law, unless a majority of the people voted for it.*" With all deference, I must say that the reasons given by the judges, who gave the opinions in that case, have failed to carry conviction to my own mind. The free school law, as far as I can perceive, was passed in the usual manner by the senate and assembly, and signed by the governor. All legislative forms were complied with,

and to call it not a law, passed *in presenti*, to take effect *in futuro*, upon the happening of a contingency, seems to me hardly calling things by their right name. The law certainly gave the vote, and not the vote the law. The vote was the event upon which the law was to become operative, and not the passage of the law. There is no provision in the constitution, prohibiting the legislature from fixing the time, or the event, upon which a law is to take effect, or go into operation; and if we are right in supposing that the legislative power is supreme, except when prohibited, then there can be no good reason for saying that the legislature are at all trammeled in fixing upon the time, or the event. I hold that a law might be made to take effect upon the death of an individual, upon his going to New York; upon the commencement or conclusion of a war; or upon the happening of any other event which the legislature, in their wisdom, may fix upon. Those who think otherwise, in my humble judgment, do not duly appreciate the transcendent powers of the legislative department of our government, or if they do, are unwilling to submit to that power. If the legislature possess the power of fixing the contingency, their manner of doing it, is left to their own discretion. That discretion cannot be controlled, or in any manner interfered with, by the judicial department.

But there is another view of this case. It will be, of course, conceded that the legislature can delegate the power to make laws to municipal corporations, and if so, why not to the constituents of such corporations? Where is the authority for conferring this power upon the one and not upon the other? The legislature have in many instances conferred the power to raise money, by the vote of the inhabitants of certain localities, as towns and school districts, and how does this differ from the power conferred upon our citizens?

There is another view, also, of this matter. Suppose this delegation to the electors of Rochester to say whether this law which shall go into effect is unconstitutional, then the 291st section is void, and must be stricken out; but the other provisions or sections are perfect, and must remain. It will be recollect-

ed that the 293d section expressly declares that the act shall take effect immediately. By this section, all the valid parts of the act go into effect and become operative. The others being void, of course, must be stricken out. In the case of the prohibitory liquor law, some of the sections were declared unconstitutional, and others good.

S. Mathews, for the plaintiff. I. The city of Rochester, in its corporate character, could not lawfully subscribe for, nor take and hold the stock of the Rochester and Genesee Valley Rail Road, which is the subject matter of the contract between the parties. (1.) The act incorporating the city of Rochester confers no such power. (*Laws of* 1850, 501.) No corporation can exercise any powers except such as are expressly granted, and such as shall be necessary to the exercise of the powers so granted. (1 *R. S.* 600, § 3. *See Riley* v. *City of Rochester*, *Selden's Notes of Cases*, *Oct.* 1853, *p.* 4.) (2.) The right to take and hold this stock is, however, claimed under the authority of an amendment of the city charter, passed July 3, 1851. (*Laws of* 1851, *p.* 767, § 285 *to* 292.) The plaintiff insists that the authority claimed is not conferred, because there is no evidence that the sections in question ever became a law. A legislative enactment cannot be proved by parol. Besides, there was no law authorizing an election. The section relating to this election had not become a law when the election was held. (2.) The legislature could not confer the authority claimed upon a corporation, incorporated for municipal purposes only. It is not within the scope of legislative power. The legislature could not, either directly or indirectly, impose a tax of $300,000 upon the property of the citizens of Rochester, to be paid to the Genesee Valley Rail Road Company, either in exchange for its stock or otherwise. Such a power would be contrary to the fundamental principles of all free governments. (*See* 1 *Bay*, 93; 7 *John.* 500, *opinion of Kent, Ch. J.*; 9 *B. Monroe*, 345; 3 *Dallas*, 383; *Const. art.* 1, § 6, 7.) (3.) The law is unconstitutional. The law was not constitutionally passed. It was not competent for the legislature to submit the question to the people of Rochester, whether

or not the sections mentioned should become a law. (*Barto* v. *Himrod*, 4 *Selden*, 483. *Rice* v. *Foster*, 4 *Harrington*, 479. *Parker* v. *Commonwealth*, 4 *Barr*, 507.) The act of which the sections are a part, is a private and local law, and embraces more than one subject, and the subjects are not expressed in the title. (*Const. of* 1846, *art.* 3, § 16.) The legislature could not constitutionally enact such a law; such an exercise of legislative power is plainly prohibited by the constitution. (*Id. art.* 8, § 9.)

II. If the law of 1851 is not valid, then the city could not acquire any title to the stock, and could not give to Mr. Clarke any title. The attempt to acquire the stock by the city and to sell it to Mr. Clarke, was illegal. There was not, therefore, any consideration for the agreement to purchase. This case cannot well be distinguished from the case of *Rodman* v. *Munson*, (13 *Barb.* 188.) affirmed in the court of appeals, in *Newell* v. *The People*, (3 *Selden*, 9.)

III. The plaintiff is entitled to recover back the money which he has paid on the contract. (1.) The contract is illegal. The defendant attempted to do an illegal act, in asserting its right to the stock. The city corporation could not deal in stock. The contract was therefore illegal and void, and the money paid upon it may be recovered back. (*See Chitty on Cont.* 636, 7, *and cases cited; and see note* 3, *p.* 622, 3.) (2.) There is a total failure of consideration, and for that reason the money may be recovered back. The city contracted to sell that which turns out to be utterly worthless. In such cases it is the right of the vendee to rescind and to recover back the money paid. (*Young* v. *Cole*, 3 *Bing. N. C.* 724. *Rice* v. *Peet*, 15 *John. Rep.* 503. *Chit. on Cont.* 624.) So long as the contract remains executory, the plaintiff may rescind and recover back the money paid. (*Morgan* v. *Goff*, 4 *Barb.* 524. *White* v. *Franklin Bank*, 22 *Pick.* 181.)

E. Darwin Smith, J. This action was brought to recover the sum of $41,740, paid for principal and interest by the plaintiff upon a contract for the sale to him by the defendants of 3000 shares of the stock of the Rochester and Genesee Val

ley Rail Road Company, issued under and in pursuance of sections 285 to 292, inclusive, of an act to amend the charter of the city of Rochester, passed July 3d, 1851.

The learned judge before whom the cause was tried, without a jury, at the circuit, has found, as a conclusion of law upon the facts stated in the case, that the said sections 285 to 292, inclusive, of the act aforesaid, never became a valid law of the state, and that the subscription to, and the taking of, the said 3000 shares of the stock of the Genesee Valley Rail Road Company, authorized and taken under said sections, were illegal and void; that the several payments made by the plaintiff to the defendants therefor, were made without consideration, and that the plaintiff was entitled to rescind the said contract and require the repayment and recover against the defendants the several sums, with the interest thereon, and accordingly rendered judgment for the plaintiff for the money so paid, deducting certain offsets specified in the case. From this judgment the defendant has appealed to this court, and we are called upon to review the decision of the circuit judge upon the single question, whether the said sections of tne act aforesaid, were or were not constitutional and valid.

Under our republican system the powers of government are distributed to the executive, legislative and judiciary departments. It is the exclusive province of the legislature to enact the laws, and to pass upon all questions relating to their expediency, the time, manner and mode of their operation. It pertains to the judiciary to interpret the laws thus enacted, and to carry the same into effect. Acting in common with the legislature, under the constitution which both are sworn alike to support, it is our duty to bring all laws, when called upon in due form to enforce them, to the touchstone of the constitution, and to pronounce against the validity of all acts clearly in conflict with the fundamental law.

The invalidity of the act under which the defendant took the stock and issued the city bonds in question, is placed by the learned judge who tried the cause at the circuit, as appears from his opinion, upon *two* grounds. First, on the ground that

the sections of the act conferring the power upon the mayor and common council of Rochester to subscribe for the stock in the Genesee Valley Rail Road Company, and issue bonds to pay for the same, were not duly passed in conformity with forms prescribed in the constitution. Secondly, on the ground that the legislature could not confer upon municipal corporations, and the defendant could not exercise, the powers of subscribing to the stock of a rail road company and issuing bonds of the city as authorized by the charter in question.

In approaching the *discussion* of the questions presented upon this appeal, it is impossible that we should be insensible to the great importance of the cause, and of the uncommon magnitude of the interests involved in its decision. Aside from the $300,000 of the bonds of the city of Rochester, in question in this action, now, doubtless, in the hands of innocent holders who have purchased them for their full nominal amount, probably millions of other bonds, of like character, have been issued by other city and town authorities, all to be affected by our decision. The pecuniary loss to individuals which the affirmance of the decision of the circuit judge will involve, the check it will give to many important public improvements in this state and elsewhere, and the disastrous influence it must have upon public credit, and upon the character of the cities and towns, and of the states under whose authority and laws these bonds have been issued, can scarcely be over estimated. Considerations of this kind, while they cannot be unheeded or unappreciated by the court, cannot be permitted to divert us from our duty, to declare the law according to our convictions, irrespective of the consequences. They may, however, most fitly be permitted to exercise a proper influence in impressing upon us the duty of more than ordinary carefulness in our investigations, deliberations and conclusions.

The first question presented upon this appeal is purely one of *form*. It is not the first question in the order discussed in the opinion of the circuit judge, but meets us *in limine* in the case, and should, we think, be first considered; for if the objection it presents is well taken, it is necessarily conclusive of the cause.

This question is based upon the decision of the court of appeals in *Barto* v. *Himrod*, (4 *Selden*, 483;) *Thorne* v. *Cramer*, (15 *Barb.* 112,) and *Bradley* v. *Baxter*, (*id.* 122.) These cases arose under the act "to establish free schools throughout the state, passed March 26, 1849." The tenth section of that act was as follows: "The electors shall determine by ballot at the annual election to be held in November next, *whether this act shall or shall not become a law.*" Sections 11, 12, 8, 13 provide for submitting the question to the people at the next election, and prescribe the form of the proceedings for that purpose. The 14th section was as follows: "In case a majority of all the votes in the state shall be cast against the new school law, this act shall be null and void, and in case a majority of all the votes in the state shall be cast for the new school law, *then this act shall become a law*, and shall take effect on the first day of January, 1850." The court of appeals held that this act was invalid, "because the provisions contained in it in relation to free schools were never constitutionally enacted." Judge Ruggles who gave the leading opinion, says of the provisions of the act, that "they were not law or to become law until they had received a majority of the votes of the people at the general election, in their favor, nor unless they received such majority. It results, therefore, unavoidably from the terms of the act itself, that it was the popular vote which made the law. The legislature prepared the *plan* or *project*, and *submitted it to the people to be passed or rejected.*" Judge Willard, who also gives an opinion in the case, says of it: "In short, the law was a mere *proposition submitted to the people, to be adopted or rejected, as they please.*" It is upon this ground that the decision was put: that the act in question had none of the properties of a law—that it was a mere *project or proposition* of the legislature submitted to the people for their adoption or rejection. It is, of course, an authoritative and binding adjudication upon the case presented, and affords a conclusive rule for the decision of all cases depending upon the same facts. While we bow to its decision on the point presented, we are at liberty to dissent from some of the reasoning advanced for the

decision, and submit, with respect, that the soundness of some of the conclusions or views contained in the opinions of the learned judges who gave the opinion of the court, may well be questioned. But the case doubtless establishes the rule in this state, and the legislators cannot evade the responsibility of passing *general acts* by submitting a project of a law to the people for their acceptance or rejection.

We come then to the question whether the rule thus established applies to the sections of the act to amend the charter of the city, under which the points in controversy now presented to the courts have arisen. The act in which these sections are contained is entitled "An act to amend an act entitled an act to amend and consolidate the several acts relating to the city of Rochester, passed April 10, 1850, passed July 3d, 1851, three-fifths being present," as the same appears in the session laws of 1851, ch. 38, 9, p. 757. The act consists of 24 sections, containing provisions in respect to a great variety of particulars before the sections 285, 6, 7 and 9, 290, 91 and 92, in question, occur, which are additions to the charter. Section 285 declares that "It shall be lawful for the common council of the city of Rochester to borrow, on the faith and credit of said city, any sum of money not exceeding $300,000, for a term not exceeding twenty years, at a rate of interest not exceeding seven per cent per annum, and to execute bonds therefor, under the corporate seal and the signature of the mayor, and such other officers as the common council may designate; the bonds so to be executed may be in such sums and payable in such places and times, not exceeding twenty years, and in such form, as the common council may deem expedient." Section 286 authorizes the common council to dispose of such bonds in such manner as they shall deem advantageous for the city, and the money which shall be so raised to be invested in the stock of the Rochester and Genesee Valley Rail Road Company, and employed and used in the construction of said rail road *buildings* and *appurtenances, and for no other purpose;* and the common council was authorized to subscribe for or purchase said stock, to the amount of $300,000, the city to acquire all the rights and priv-

ileges and be liable to all the responsibilities of stockholders Section 287 provides that the dividends to be received on the stock shall be applied to pay the interest on the bonds, and in case of a deficiency, the amount to be made up by taxation, in the same manner as other city expenses. Section 288 allows the common council to loan the money to be received on the bonds, before it shall be required in the construction of the road, to banks. Section 289 authorizes the common council to exchange the stock for the bonds, or to sell the same. Section 290 provides that the common council shall nominate and appoint one director in the rail road company for every $75,000 of stock held by the city at the time of any election of directors. Section 291 declares that the preceding sections 285, 286, 287, 288, 289, 290, together with this section, (sec. 291,) shall not take effect until they shall be submitted to the electors of the city of Rochester, qualified to vote for charter officers of said city, at such times as the common council shall direct, for the purpose of determining "*whether or not it is expedient for said city to borrow the money mentioned in said sections for the purpose therein specified,*" and provides also particularly how the election shall be conducted, the votes canvassed, the result ascertained, and a certificate thereof filed in the city clerk's office, in the same manner as at the other charter elections. Section 292 is as follows: "If the said sections 285, 286, 287, 288, 289, 290, 291, shall be approved by two-thirds of the votes of the electors of said city and voting at such elections, as above prescribed, then the same shall take effect immediately after the filing of the certificate of such approval of the said act by the mayor and clerk of the said common council."

In construing this statute, both in reference to its constitutionality and in respect to its legal force and operation, we are to be governed by certain clearly defined rules.

1st. In respect to its constitutionality. We can declare an act of the legislature void only when it violates the constitution, *clearly*, *palpably*, *plainly*, and in such manner as to leave *no doubt* or *hesitation* on our minds. This rule is very

generally asserted in the courts of this country by the judges of the United States and state courts. (6 *Cranch*, 87. 4 *Dallas*, 14. 3 *Serg. & R.* 178. 12 *Wheat.* 270. 10 *Conn. R.* 522. 1 *Cowen*, 550. 13 *Pick.* 60. 21 *Penn. R.* 9. *Harris*, 164. *Sharpless* v. *The Mayor of Philadelphia.*) In 14 *Mass. R.* 345, (*Adam* v. *How*,) the rule is thus stated: "The legislature is in the first instance to be judge of its own constitutional powers, and it is only when manifest assumption of authority, or misapprehension of it *clearly appears*, that the judicial power will refuse to execute the law." And in *Wellington* v. *Petitioners*, (16 *Pick.* 95.) Chief Justice Shaw says the courts should "never declare a statute void unless the nullity and invalidity of the act was placed, in their judgment, beyond reasonable doubt;" and such is the rule as laid down by the judges in most of the state courts. 2d. So in the exposition of a statute, it is the duty of the court to seek to ascertain and to carry out the intention of the legislature in its enactment, and to give full effect to such intention; and they are bound so to construe the statute, if practicable, as to give it force and validity, rather than to avoid it, or render it nugatory. (*Dwar. on Stat.* 690. 2 *Rol.* 126. 11 *Coke*, 73.)

Looking at this act in the light of these principles, and assuming that the legislature had no purpose, in its passage, to transcend its constitutional powers, we come then to the inquiry, what is the true interpretation of the act in respect, in this connection, to the principles and rules which must govern the enactment of laws as declared in the case of *Barto* v. *Himrod*. The inhabitants of the city of Rochester were many years since created a corporation for municipal purposes, by the name of "The City of Rochester." The act of July 3, 1851, was an act amending the charter of the city, and contains a great variety of provisions enlarging and modifying the powers previously granted. The incorporation of the sections 285 to 291, inclusive, in the act, was designed as an enlargement of the powers of the city government. Municipal, like private corporations, derive all their powers from the legislature, which may grant such powers as it pleases, and may

enlarge, abridge or take away such powers as are of a pure municipal character, in its legislative discretion. The power conferred upon the common council in these sections, we will assume, at this stage of the discussion, to be entirely within the limits of the legislative power. In section 285, explicit power is given to the common council to borrow $300,000, on the faith and credit of the city, and issue bonds therefor under the corporate seal. Section 286 directs that the money so bor rowed shall be invested in the stock of the Genesee Valley Rail Road Company, and *employed* and *used in the construction of the said rail road.* The intention of the legislature was very clearly to give to the city of Rochester power to aid with this $300,000 in the construction of the Rochester and Genesee Valley Rail Road. This road, it appears in the case, is "a road commencing at the city of Rochester and running southerly along the valley of the Genesee river, and when completed is to terminate at Portage, in the county of Allegany." That this enterprise was one of public utility, and one locally beneficial to the city of Rochester, the legislature have clearly determined. Whether it was to be relatively of such local benefit as to warrant the city in incurring a debt of $300,000 for its construction, was a question the legislature did not decide. It gave the power, and left it for the corporation, the body of the citizens, to determine that question for themselves. The power thus conferred upon the people of Rochester was not, within the case of *Barto* v. *Himrod*, a delegation of the power to *pass the law*, but a fit and proper restraint or limitation upon the power granted in the said act, and entirely within the limits of the legislative discretion. The act itself was complete when it had passed the two houses of the legislature and received the signature of the governor. It had all the attributes of a law. It was *perfect, final* and *decisive in all its parts.* Its final section, in explicit terms, declares that "*This act shall take effect immediately.*" It imparted new power to the corporation, which it might or might not accept and exercise; but the legislature had done all its duty in the matter—exercised its full discretion on the subject, and left it for the

city to accept or not, the power conferred. It left no matter to the discretion of the citizens of Rochester, except what related to the execution of the law. The power to make a law includes and implies the power to fix and determine its *terms, conditions* and *provisions*. No such power was conferred by this act. The question referred to the electors of the city of Rochester was, in substance and effect, whether the charter privileges offered by the legislature should or should not be accepted. The election to be held, as prescribed in section 291, was "*for the purpose of determining whether or not it was expedient for said city to borrow the money mentioned in said sections, for the purpose therein specified.*" The legislature passed an act giving enlarged power to the common council, subject to the acceptance, assent and approval of the corporation. The common council is not the corporation. It is the mere local legislature of the city. The inhabitants of the city are the corporation. (*Sec.* 2 *of charter.*) The legislature provided that the powers specified in these sections should not be exercised by the common council without the consent of the corporators, to be ascertained in a prescribed legal form of an election. The powers specified in the sections were dormant; were yet *in fieri*, until the corporators accepted them and assented to their exercise, (4 *Wheat.* 688,) precisely as is the case with every charter to a municipal or private corporation ever granted by the legislature. Every such charter, and every enlargement of its powers and franchises, require the assent and acceptance of the corporators. This consent may be, and ordinarily is, *implied*, from the application for the charter, the beneficial nature of the grant or the exercise of the corporate powers, but in principle it is supposed to be always given, either expressly or impliedly. (*Angell on Corp.* 51. *Kyd on Corp.* 65. *Wilcock on Mun. Corp.* 27–30. 4 *Wheat.* 518.)

In this case the legislature deemed it fit to require an *express acceptance* of the powers proposed to be conferred upon the legislative agents of the defendant before they should have authority to commit the corporation to the large debt in question and

the contingent liability to the taxation involved in its creation It was entirely optional with the city of Rochester whether the proposed grant of power should or should not be accepted. The state could not enforce the grant upon the city against its will and this would have been so if the provision for an express acceptance of the new charter had been omitted. (*Willcock on Municipal Corp.* 30. 3 *Hill*, 541. 3 *Term R.* 240.) It is therefore a case of proper and legitimate, if not necessary, *conditional legislation.* It is the precise case mentioned by Judge Ruggles in *Barto* v. *Himrod*, of a statute which is a law *in presenti*, to take effect *in futuro.* It is a perfect grant of power, to take effect on its acceptance by the corporation. It is just such conditional legislation in substance and effect, as our statute books are full of, from the time the people of this state assumed the right to govern themselves and pass through their own legislature such laws as they deemed best adapted to promote their welfare and happiness. The act amending the charter of the city of New York, and providing for the construction of the Croton water works was just such an act, and provided for the express acceptance of the grant in the same manner as in this case. (*See Sess. L.* 1834, *p.* 451.) Of all the various charters of cities, banks, turnpike and rail road companies, and other numerous municipal and private corporations organized in this state since the revolution, the acts have not uniformly created the corporation in *express words.* They have in many, if not in most cases, merely conferred a power or authority to organize the corporation. Acts *in pais*, in acceptance of the charter, in adopting it, complying with its provisions, and organizing under it, have generally been essential to bring the corporation into being. Have the corporators in all these cases created the corporation? The legislature, a few years since, authorized the Rochester and Auburn and the Auburn and Syracuse rail road companies, with the consent of their stockholders, to consolidate their stock and organize a new corporation. The Rochester and Syracuse Rail Road Company came into corporate existence under this act. And a few years subsequently all the rail road companies between Albany and Buffalo were authorized to unite

their stock and capital and organize a new company. They did so, and named it the New York Central Rail Road Company. Did the legislature or these rail road companies create the new corporations? Numerous other instances of like conditional legislation in granting provisional powers might be cited. This principle is well stated by Judge Marshall in *Slack* v. *The Maysville and Lexington Rail Road Company*, (9 *Monroe's Rep.* 526.) He says, "It is not essential to the character and force of a law that the legislative enactment should itself command to be done every thing for which it provides. The legislative power to command a particular thing to be done, includes the power to authorize it to be done. The act done under authority conferred by the legislature, is as precisely legal and valid as if done in obedience to a legislative command. So far as such statute confers authority and discretion, it is as obligatory from the first as the legislative power could make it; and although its further practical efficiency may depend upon the discretionary act of some other body or individual, it is not derived from that, but from the will of the legislature, which authorized the act and prescribed the consequences." And in *Rice* v. *Foster*, (4 *Harrington*, 479.) decided by the court of appeals of Delaware, the chief justice says: "A law altering, abridging or enlarging the vested powers of corporations aggregate, subject to the consent of the corporation, or a law giving to school districts a portion of the school fund, on condition that such district will raise an equivalent or proportional sum, are all instances of proper conditional legislation, even though the assent of the corporations in the one case to the change of their charter, or of the district in the other to accept the donation and comply with its terms, should be signified by a majority vote. They are all good conditions, capable of being performed without in any way interfering with the legislative will." And again the same learned judge says: "To say that the authority given to the school voters, the members of a corporation, to determine whether a tax shall be laid or not, is a grant of legislative power, is an abuse of language." In same case Judge Harrington asserts the same views. And in the very able opinion of Judge Ranney, who

gives the unanimous opinion of the supreme court of Ohio, in a case in all its particulars quite like this, (*McCook's Ohio Rep.* 78,) after speaking of the school laws of the state, and the erection of town houses by vote of the town, he says: "Every act of incorporation ever passed necessarily refers the question of its acceptance to the corporators. These all present cases where the discretion is left to the body of those interested or to be affected. But because such discretion is given, are these and all other similar enactments to be deemed imperfect and nugatory? It would take a bold man to affirm it. In what does the discretion consist? Certainly not in fixing the terms and conditions upon which the act may be performed or the obligations thereupon attaching. These are all irrevocably prescribed by the legislature, and whenever called into operation conclusively govern every step taken." Also in *Mooers* v. *The City of Reading*, (9 *Harris' R.* 202,) in a case where it had been left to the voters of the city of Reading to determine whether the city should take stock in a rail road company, the supreme court held that "there was no delegation of legislative power, and they could see no reason why the *acceptance* of a new power tendered to a public corporation, may not be made to depend on the will of the people, when it is expressed by themselves as when it is spoken by the mouths of their officers and agents."

To say in this case that the act vesting the power in the common council to contract the debt, and subscribe for the stock subject to the acceptance of the citizens of Rochester, on their approval thereof in the form prescribed, was a delegation of legislative power, was conferring power upon the citizens of Rochester to *pass the law*, is truly as was said by my brother Johnson, in *Johnson* v. *Rich*, (9 *Barb.* 684,) a "sheer confounding of all proper distinctions;" is an abuse of language; and so to hold would be a gross invasion of the discretion and rightful authority of the legislature."

But upon this question of *form*, so far from being clearly and palpably unconstitutional, we think the act in question is in substance and effect in the form, and after the model suggested or prescribed in the constitution itself, in relation to the

same subject matter, the *creation of public debts;* and is in this particular, in precise and distinct conformity with its spirit and intent. Probably no single sentiment was more pervading in the public mind shortly before the convention of 1846, or more contributed to the calling of the convention, than a desire to impose some restraint upon the power of the legislature to contract public debts. The country had just passed through a period of extreme financial embarrassment. Many state and corporate debts had been repudiated, or the interest thereon had not been paid, and it perhaps may not be amiss, or do any injustice to history to say, that there was prevailing throughout the whole country at that time, a sort of feverish excitement on the subject of state and corporate debts. The members of the convention, elected under the influence of this sentiment, doubtless thoroughly sympathized on this subject with this general feeling of the people. Their apprehensions and their remedy in respect to this great evil, are illustrated in the 7th article of the constitution. Section 9 provides that the credit of the state "shall not in any manner be given or loaned to or in aid of any individual, association or corporation." This provision cuts up one prolific source of the evil complained of. Section 10 limits the power of the state to borrow money to meet casual deficits and failures of revenues and expenses not provided for, to the amount of $1,000,000. Section 11 allows other debts to be contracted to repel invasion, supress insurrection and defend the state in time of war; and section 12 provides that no debt except the above shall be contracted, unless such debt shall be authorized by a *law* for some single work—such *law* to impose a tax to pay interest and discharge the principal within 18 years—and "no such *law* shall *take effect* until it shall have been submitted to the people and have received a majority of all the votes cast for or against it at such election." "On the final passage of such *bill*, the question shall be taken by ayes and noes," &c. "to be entered on the journal thereof, and shall be: 'shall this bill pass, and ought the same to receive the sanction of the people?' The legislature may at any time after the *approval of such law by the people* forbid

the contracting of the debt," &c. "No such *law* shall be submitted to be voted on within three months *after its passage*, or when *any other law* shall be submitted to be voted for or against."

It will be seen from the above, that before the passage of an act providing for the contracting of a state debt under the foregoing provisions of the constitution, the project or proposition is appropriately called a *bill*. After it has passed the two houses, and before its approval by the people, it is called *a law*—of course the governor's signature to it is to be implied, for this must necessarily precede its submission to the people. By the language and clear implication from the terms of this section, the *bill* has become and is a *law*, before its submission to the people. It is not submitted to the people to *pass the law* —there is no delegation of power to the people to *pass the law*. It is complete and perfect when it is submitted, and is submitted for the *approval of the people*. To call this legislation by the people is an entire misnomer—a total misconception of the whole section and its object. It was designed simply as another *check* to hasty and improvident legislation in addition to the veto of the governor. It was designed, in the expressive language of Mr. Hoffman, the chairman of the committee who reported it to the convention, as another "safeguard," "to protect the people in all their rights from the dreadful calamity of a great debt." This safeguard was "the people at large."

In the precise *form* prescribed by the constitution to the legislature when it is proposed to create a *state debt*, and in the precise language of the constitution itself when such is the object, the legislature have passed the amendments to the charter of the city of Rochester in question in this suit. The reason being the same for the same course of proceeding where the object of the proposed law is to create a *city* or *corporate debt*, the legislature have adopted the same mode of proceeding as though it were a state debt. It has left it to those who are to be liable *to pay* the debt, if one is contracted, to say whether the debt shall or shall not be contracted. The spirit—the pre-

scription of the constitution has been, in this instance, most faithfully followed and obeyed. It cannot be, that an act thus passed can fairly be pronounced to be *clearly* and *palpably* in conflict with the constitution. It may be that the people will judge and decide unwisely in respect to state and city debts under such submissions to them, but who has the right so to say? If the people of such a city as Rochester in respect to a proposed city debt, or the people of this state at large in respect to the contraction of a state debt, cannot be trusted to decide finally the question for themselves, the whole theory of popular sovereignty is a delusion, and it must be admitted that our people are incapable of self government. In all forms of government, there is doubtless much abuse in the contracting of public debts, but in this particular it has always been supposed in this country, that republican government afforded the best guaranty for the protection of the interests of the people in the fact that those who are to *bear the consequences* involved in the contraction of such debts, must themselves consent to or *commit the folly*. But if this consideration be not sufficient to deter a practical and highly intelligent people from rushing heedlessly and improvidently into debt, it is not the duty of the judiciary to save them from learning such a salutary lesson of wisdom as the tax gatherer is particularly adapted to inculcate, or to relieve them from the dishonor of repudiation, by a doubtful interpretation of the law, or a strained and questionable construction of the constitution.

Secondly. We come next to the second question for discussion, whether independent of the questions above discussed, the legislature could constitutionally confer, and the city could possess and exercise, the power specified in the sections of the charter aforesaid.

I do not understand from the opinion of the circuit judge that he finds any section or portion of the constitution with which these sections of the charter come expressly in conflict, upon which he rests his opinion, or that they violate *directly* any particular provision of the constitution, except incidentally, as hereinafter mentioned. The chief argument of the learned

judge is that the subscription to this stock and the issuing of the city bonds to pay therefor, involve, or may involve, a resort to taxation to pay the principal and interest in whole or in part upon the bonds; and that municipal corporations, being organized only for political purposes, can only exercise or be authorized to exercise the right of taxation "in respect to the proper public burthens incident to the city government and the exercise of the political powers." The learned judge says in another part of his opinion, that "the decision of the question might very properly be rested, in the absence of any express power conferred by the people, in the constitution, and aside from any of the prohibitory and restraining clauses in the instrument, upon the absolute want of power in municipal corporations to burthen or tax the property of the citizens for the purpose named, and the want of jurisdiction in the state legislature to confer the right." This view involves a discussion of the theory and powers of government under our system. At the revolution all power reverted to the people, and they were at liberty to institute and establish such government as they deemed best calculated to secure their rights and liberties, and most conducive to their safety and happiness. In their original capacity, through delegates to a convention for that purpose chosen, they ordained and established the present form of government, and vested the supreme legislative power of the state in two separate bodies of men, one called the ASSEMBLY and the other the SENATE. The legislative power thus vested was and is undefined and unlimited in terms, as it is in its nature undefinable as to its extent. All the original inherent power of the people to legislate for themselves, to provide for their general welfare, and to promote their common interest and happiness, was conferred upon the legislative department of government thus created. The powers of the legislature were then and are still as omnipotent as those of the British parliament, except as the people have since delegated portions of their original power to the general government, and have restricted or limited the legislature in our state constitution. The constitution of the United States and that of our own state

constitute the only restriction or limitation of the legislative power. It is, aside from these limitations, supreme, uncontrollable, and omnipotent, in respect to all other matters and subjects. The taxing power is one of the inherent powers of government, and belongs appropriately to the legislative department. (4 *Wheat.* 428. 4 *Peters*, 514, 561, 563. 4 *Comst.* 419, 29. 3 *Kern.* 144.) Within the limits of legitimate taxation the legislative discretion is utterly uncontrollable, as it is undefinable in its *objects, purposes, uses* and *extent.* The legislature cannot under this taxing power take the property of one man and transfer it to another, for that would violate the provision of the constitution "that no one shall be deprived of life, liberty and property without due process of law." It cannot take the property of individuals for public use without just compensation; but short of that extent, and so far as the tax is general or imposed upon all, or all of a class of persons within prescribed limits or districts upon some common principle or rule, and the tax is for some public purpose, there is no limit to the power of the legislature to authorize taxation, and no remedy or mode of correction for unjust laws involving such taxation, but through the ballot box.

This brings us to the inquiry what works or objects are for the *public benefit*, or are of such a public character as to justify such taxation. Rail roads are clearly works constructed for the public benefit. They are not mere private enterprises, built and operated exclusively for the benefit of the stockholders. The right of private corporations to take property is the right of the state, the right of eminent domain, and can only be justified and sustained on the ground that the lands so taken are taken for the public use. Lands for this purpose may be so taken on payment of a just compensation, precisely as the state might by its own agents take the same. This is the ground upon which this right was put by the chancellor, in *Beekman* v. *The Saratoga Rail Road Company*, (3 *Paige*, 45,) and by the supreme court in *Bloodgood* v. *Mohawk Rail Road Company*. (14 *Wend.* 57,) which last case was affirmed in the court for the correction of errors, (18 *Wend.* 9,) and the same doctrine has since been re

peatedly acted upon and asserted in the courts of this state The doctrine of all these cases is that the state itself might construct these works at the public expense; and that what it may lawfully *do* for the public benefit, it may authorize corporations to do as its agents. The state might construct these rail roads by its own agents, with the funds of the state, as it does canals; or it might take stock in all or any of these rail road companies. The state was a stockholder in all the early banks chartered in this state; in the Bank of North America, the New York Bank, the Albany Bank, the Farmers' Bank, and the State Bank, and most others chartered under the constitution of 1777. Instead of building rail roads, turnpike roads, constructing bridges over large streams, making slack water navigation upon our rivers, and doing many other acts of internal improvement, the state has authorized corporations to do the same thing. Such has ever been the policy and the practice of the state, since it exercised the powers of an independent sovereignty.

But if the state had undertaken to construct all such works as state works for the benefit of the state, as it has the canals, many of such works would, and must obviously, be of especial local benefit to some parts of the state and of no particular benefit to other parts. Can there be any doubt that the state might have imposed taxes in respect to such questions of local benefit? Could it not tax cities, or towns, or counties, to meet such local benefits? and if it had done so, who could question the legislative discretion or power on the subject? All the taxation and assessments of municipal corporations is made and sustained upon the ground of benefit locally conferred. In 4 *Comstock*, 424, Judge Ruggles says: "Taxation exacts money or services from individuals as and for their respective shares of contribution to any public burdens." Municipal corporations possess too in a large degree the rights and franchises of private corporations. All cities as such have more or less property. They own or may own their gas works, water works, school and market houses, city halls, court houses, bridges, (and in some instances collect toll thereon,) and other works, and for aught I can see, under state authority might erect and operate a flour

ing mill for the benefit of the inhabitants of the city. This consideration seems to have been overlooked by the learned circuit judge. The views expressed in his opinion treat municipal corporations as *mere political bodies*, created for purely governmental purposes and incapable of exercising any other powers. The chief design of municipal corporations is doubtless to promote the interests of the locality in respect to mere civil government, but other powers and franchises may be annexed to and exercised by the corporations, as is probably the case with most of the municipal corporations in the state. In the case of *Bailey* v. *The Mayor of New York*, (3 *Hill*, 531,) Chief Justice Nelson, giving the opinion of the supreme court, puts the liability of the corporation to pay for damages resulting from the unskillful construction of a dam across the Croton river for the supply of water to New York city, upon the express ground that "the defendants *quoad hoc* were to be regarded as a private company." He says: "It [the corporation] stands on the same footing as would any individual or body of persons upon whom the like special franchise had been conferred," and cites a large number of authorities on the point. This decision too was affirmed in the court for the correction of errors. (2 *Denio*, 433.) In this case Chief Justice Nelson puts a hypothetical case quite in point. He says: "Suppose the legislature instead of the franchise in question had conferred upon the defendants banking powers, or a charter for a rail road leading into the city, in the usual manner in which such powers are conferred upon private corporations, could it be doubted that they would have the same character and be subject to the same duties and liabilities?" How far it is wise to confer such franchises upon municipal bodies may well be doubted; but that is a question for the legislature. In all such cases and upon all such questions the legislature is the exclusive power to determine what franchises shall be conferred upon municipal and private corporations, and to determine also upon the expediency of the construction of any class of improvements, and to determine the question whether they are or are not works for the public benefit. No power exists under the constitution to review their

decision, except the power of the people to change their legislators. Certainly the judiciary has no power to review the decision of the legislature upon such questions. To do so would be to assume the rights of a council of revision; would make the judiciary a sort of despotic power in the state to determine what laws the people should or should not make; would make it a power odious and unendurable. The subscription to the stock of the rail road by the city, and the issuing of the city bonds to pay for the same, does undoubtedly, as the learned judge holds, involve the necessity of levying a tax to pay principal and interest; and if such tax cannot lawfully be imposed, the act or section thereof in question must be invalid.

But the right of the legislature to authorize a local tax, it seems to us, cannot *seriously* be controverted. It is distinctly asserted, in the case of *Thomas* v. *Leland*, (24 *Wend.* 65,) where the legislature authorized a tax upon the city of Utica to defray the expense incurred by a change in the termination of the Chenango canal. It is also distinctly asserted in the opinion of Chancellor Walworth, in the case of *The Mayor of New York* v. *Livingston*, in the court for the correction of errors, (8 *Wend.* 101,) in these words: "It is a well settled principle, that when any particular county, district or neighborhood is exclusively benefited by a public improvement, the inhabitants of that district may be taxed for the whole expense of the improvement, in proportion to the supposed benefits received by each." This case and doctrine is substantially re-affirmed by the court of appeals, in *The People* v. *The Mayor of Brooklyn*, (4 *Comst.* 436; 3 *Kern.* 144.)

That rail roads are public improvements, which the state may construct, itself, or authorize to be constructed by corporations; that the state may be a stockholder in such a corporation, and may also authorize municipal corporations to become stockholders therein, and may levy taxes to pay interest and principal upon such stock, and authorize municipal corporations to levy a local tax for that purpose, is also fully established by the following cases in other states: In the case of *Sharpless* v *The Mayor of Philadelphia*, (21 *Penn. State Rep.* 9 *Harris.*

148,) in which the opinion, of remarkable ability, is given by the late chief justice, now attorney general of the United States. Also, in the case of the *Cincinnati Rail Road Company* v. *Clinton County*, (1 *McCook's Ohio State Rep.*) in which case the unanimous opinion of the court is given, in a most able and complete discussion of the whole subject, by Judge Ranney. Also in *City of Bridgeport* v. *Housatonic Rail Road*, (15 *Conn. R.* 475.) Also, in the case of *Goodwin* v. *Crump*, (8 *Leigh's Virg. R.* 120,) in which the court of appeals of Virginia affirmed the power of the legislature to enlarge the corporate powers of the city of Richmond, *with the assent of a majority*, so as to enable it to subscribe to stock of the James River and Kenhawa Company, incorporated for the purpose of uniting the water of James river with the Ohio, by a canal or rail road, and bind the minority. Also, in the case of *Nicol* v. *The Mayor of Nashville*, (9 *Humph. R.* 252,) in which a law authorizing the city of Nashville to subscribe to the stock of a rail road was sustained by the supreme court of Tennessee. Also, in the case of *Talbot* v. *Dent*, (9 *B. Monroe*, 526,) in which the validity of a subscription by the city of Louisville to the stock of the Louisville and Frankfort Rail Road Company was sustained; and also in the case of *Slack* v. *The Maysville and Lexington R. R. Co.* (*supra*,) by the courts of Kentucky, and also in the case of *Cheeney* v. *Howe*, (9 *B. Monroe*, 250.) This current of authority from six other states having substantially the same constitutions, so far as it relates to the subject in question, and the same common law, ought to be quite decisive on this question.

The doctrine of the learned judge, in holding that the invalidity of the sections of the act in question may be "rested upon the absence of any express power conferred by the people, in the constitution, upon the legislature, to authorize a municipal corporation to burthen or tax the citizens for the purpose named therein," is thus in conflict with the whole theory of our government relating to the legislative power. It proceeds upon the principle that the powers of the state governments, or the state legislatures, are *delegated* powers, which is opposed

to what is generally understood and received as sound law in respect to the relative powers of the national and state governments. If there be any doctrine that may be deemed settled, so far as to have the force of a political and legal axiom, it is that the powers of the general government are *delegated*, and those of the state governments are *original and reserved*. The views of the learned judge, so far as they go to *imply* a restriction upon the legislative power to authorize the subscriptions to the stock in question, by the defendants, are clearly untenable, if the preceding views are correct, and if it be true that the courts should only declare a law void where it is clearly in conflict with some particular provision of the constitution. Laws may doubtless be held invalid when they *impliedly* violate the constitution, as much so as when they expressly come in conflict with some of its distinct provisions. But in such case the implication must be *necessary* and *legitimate*, and based upon some express portion of the constitution. If the legislature, for instance, should pass an act directing a new trial of a cause in a court of law, or granting a pardon, after conviction, for some criminal offense, we could say the acts were void, on the ground that the legislature had invaded the province of the judiciary, or that of the executive department. So in a great variety of cases that might be suggested, where the acts of the legislature are not within the scope of the powers conferred by the constitution upon the legislative department, or exceed the limits of its power defined or restricted in respect to some particular subject matter. But the implication, in all such cases, would rest upon some particular provision in the constitution, and must be *clear* and *indisputable*, on a fair construction of the constitution, and beyond *reasonable doubt* (8 *Cranch*, 87. *Fletcher* v. *Peck*, 2 *Monroe*, 178. *City of Louisville* v. *Hiatt*, 9 *Dana*, 514.)

But the learned judge does not rest his opinion in respect to the invalidity of these sections entirely "upon the implications arising from the constitution, its object, spirit and general provisions." In one part of his opinion he says: "I will simply refer to a provision which I think expressly forbids the legis-

lature to grant the power which the act in question assumes to confer upon the common council of Rochester, and refers to the 9th section of article 8 of the constitution, which is as follows: Section 9. "It shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessment and in contracting debts, by municipal corporations." And the judge also says, in respect to the same section of the constitution, "The power to tax property in aid of a private corporation, as for the purchase of its stock, is not among the ordinary powers of a municipal and local government, and requires special legislation to confer it; and this special legislation I think clearly forbidden by this section of the constitution." This section of the constitution contains, in itself, no express prohibition upon the subject. It is merely directory to the legislature, and is entirely inoperative of its own force upon the subject to which it relates. It leaves the whole subject, as before, with the legislature, and impliedly allows that the corporation may contract debts without legislative prohibition, and certainly under the legislative authority expressly given. If the legislature could *prohibit*, it can *allow* debts to be created, and it has expressly done so in this instance, and before it had acted at all under the aforesaid section. But if it were otherwise, the legislature could *repeal* what it had enacted. The whole subject is left with the legislature, as Judge Ruggles says, in *The People* v. *Mayor of Brooklyn*, (4 *Comst.* 440,) "The direction given to restrict the power of cities and villages to make assessments, presupposes and admits the existence of the power to be restricted, and seems to remove all doubt in relation to the legislative power in question." How the learned judge can so construe this section as to make it, of its own force, a constitutional prohibition upon the legislature and upon municipal corporations, I cannot conceive. To analyze the section more clearly, the first clause is as follows: "It shall be the duty of the legislature to provide for the organization of cities and incorporated villages."

This duty to provide for their organization, implies and recognizes a discretion in the legislature in regard to the *terms, powers* and *provisions* to be contained in the charters of cities and villages. Again: "And to restrict the powers of taxation, assessment, borrowing money and loaning credit." This clause also implies and recognizes both a right in the corporations, without restriction, to tax, make assessments, borrow money and loan credit; and also a discretion in the legislature to restrict and limit this power of the corporations, and to define it; to declare how much money the cities may borrow, how much debt they may create, how much money they may levy by taxation and for assessments. And the last clause: "So as to prevent abuses in assessments and in contracting debts by such municipal corporations." How prevent *abuses* in these particulars, if the section itself contains a *prohibition*, both upon the legislature and municipal corporations? The whole section implies a discretion in the corporations mentioned in it, without restriction, and imposes a duty upon the legislature, "to limit, regulate and control that discretion." The power is with the legislature. It is wisely left there, to be exercised in its discretion. It may *restrict*, and as it may *restrict* so it may *allow* the creation of city debts, and prescribe their limits and conditions, as is done in this case. Any other view of this section of the constitution appears to us to be utterly untenable, or at least the view that it contains an express restriction or limitation upon the powers of the legislature to authorize the contracting of debts of municipal corporations cannot be maintained. It may be, and doubtless is true, that the members of the convention, or many of them, who devised the present constitution, desired to restrict more stringently the power of municipal corporations on the subject of contracting city debts, and considered that they needed such restraint as the learned judge suggests, but we can look at no undefined purpose not embodied in the instrument.

We are called upon to interpret the provisions clearly expressed in the constitution itself. We cannot go beyond the written word, if it be clear and explicit in its terms. The con-

stitution speaks for itself. It is, in and of itself, the will of the people. We can look only to its language, not doubtful, inexplicit or ambiguous. It clearly contains no express provision that forbids the legislature from passing the act to amend the charter of the city of Rochester under consideration, or any of the sections in controversy.

In conclusion we think the following propositions may be safely affirmed to be the law upon the whole case.

First. That all the inherent power of the people for self government, not delegated to the general government, is reserved to, and belongs to the state.

Second. That of such reserved powers the entire legislative power is vested in the state legislature, subject to no restrictions or limitations, except such as are contained in the state constitution.

Third. That the taxing power belongs to the legislature and is subject to no limits or restrictions outside of the United States and state constitutions.

Fourth. That the power to authorize the construction of works of internal improvement, and to provide for their construction by the officers or agents of the state, rests with, and pertains to, the legislature, to be exercised within its exclusive discretion.

Fifth. That such works may be constructed by general taxation, and in case of local works, by local taxation, or the state may aid in their construction by becoming a stockholder in private corporations; or authorize municipal corporations to become such stockholders for such purpose

Sixth. That rail roads are public works, and may be constructed by the state or by corporations, and lands taken for their use are taken for the *public use*, and may be so taken on payment of a just compensation.

Seventh. That the legislature is the exclusive judge in respect to what works are for the public benefit and in regard to the expediency of constructing such works, and as to the mode of their construction, whether by the state or by private or municipal corporations, in whole or in part.

Eighth. That the legislature may authorize municipal corpo-

rations to subscribe to the stock of a rail road company, with the consent and approval of a majority of the corporators duly ascertained.

Ninth. That the passage of a law authorizing such subscriptions to the stock of a private corporation, subject to the assent or approval of the corporation, or to take effect upon the approval or assent of a municipal corporation by the vote of the corporators, is not a delegation of power to the corporation to pass a law, but is a legitimate case of conditional legislation, and is entirely within the discretion of the legislature.

Tenth. That the act to amend the charter of the city of Rochester, passed July 5, 1851, including the sections 285 to 291, inclusive, was a valid law immediately upon its passage and the signature of the governor thereto; and that the provision therein that those sections should not take effect until approved by the corporation, merely suspended the power of the common council to act upon said sections until such approval.

Eleventh. Finally: The acts of the city of Rochester, in subscribing for the stock of the Genesee Valley Rail Road Company, and in issuing the bonds of the city to pay for such stock as stated in the case in this action, were legal and valid acts; and the city was entitled to take and hold such stock or to sell it to the plaintiff as valid stock, and is bound to pay the bonds so issued; and the plaintiff was not entitled to rescind his contract for the purchase of such stock on the ground of its invalidity.

The judgment of the special term was therefore erroneous, and should be reversed, and a new trial granted, with costs to abide the event.

WELLES, J., did not hear the argument, but was present at Auburn when the case came up for decision, and had previously examined the case, the points of counsel and the foregoing opinion, in which he entirely concurred.

T. R. STRONG, J. The foundation of this action is the alleged invalidity of the provisions of the act of the legislature relating to the city of Rochester, passed July 5, 1851, which purport

to authorize the common council of the city to borrow money on the faith and credit of the city, and issue bonds therefor, and invest the same in the stock of the Genesee Valley Rail Road Company. If those provisions are invalid, the bonds issued by the common council and the subscriptions for stock in pursuance thereof, were nullities; the agreement for the purchase of the stock and bonds by the plaintiff is without consideration and void; and the plaintiff is entitled to recover back what he had paid under that agreement. One ground on which the invalidity of those provisions is asserted is, that it was not within the scope of the legislative power of the state, independent of any restrictions in the constitution upon that power, to invest a municipal corporation with authority to burthen the property of the citizens of the locality which it embraces, by becoming stockholders in a private corporation. It is not denied but that the state may provide by law for the construction of a rail road through the agency of its own officers, taking all lands necessary for the purpose by virtue of its right of eminent domain; or delegate the power to build the road and take the lands required for it, to a private corporation. Nor is it disputed that the state may, under its taxing power, charge the expense of such a public improvement, made by itself, upon the citizens of a particular locality, which may be supposed to be more immediately benefited by the improvement; nor is it controverted that a municipal corporation may be authorized by law to make such public improvements as are required by the interests of its locality, and tax the citizens of the locality to defray the expense. The power of the state, to this extent, is unquestioned, and so well established by long exercise of it, and by judicial decisions, as to render a discussion of it unnecessary, if not unprofitable. But the precise point presented is, that a subscription for stock in a rail road corporation is like an investment in the stock of a manufacturing company, or in the mercantile, or any similar private business, of a mere private nature—foreign to the office or business of government—and therefore without the limits of the sovereign power; and that the state, not possessing the power itself, cannot confer it on a municipal corporation.

It is a question upon which there is some conflict of opinion, whether there is such a limitation of legislative power as that suggested, to matters of a public nature and incident to government; and while it would seem to be proper that the power should be thus confined, there certainly would be great difficulty in maintaining, if it would not be impossible to maintain, the limitation in practice, without conceding to and claiming for the judicial department the paramount jurisdiction to determine what is and what is not public and connected with government. This jurisdiction is legislative in its nature, and there is great force in the argument that it is indispensable to the just weight and beneficial action of the legislative department that it should exclusively belong to that branch of the government. If the limitation exists, it must be applicable to cases clearly, palpably, and without question, wholly private, and in no way relating to government. If the sole right of decision on this subject is vested in the legislature, the legislative power, beyond the restrictions of the constitution, is unlimited. It is not my purpose to discuss this question, or to express any opinion upon it, as it is entirely unnecessary, in the view I take of the position under consideration.

That position, in my judgment, is fatally erroneous, in regarding and treating the subject of the provisions in question as a private business, belonging to the same class as the business of banking and of manufacturing and commercial associations, incorporated or unincorporated. Those provisions, upon their face, clearly show that the leading object of them was to enable the city to afford aid to, and thereby secure the construction of, the Genesee Valley Rail Road. A company had been formed, under the authority of the state, for building the road, to which the state had delegated all necessary power for the purpose. It was an enterprise of a public nature, committed by the state to a private company, invested by the state for the purpose of the road, with a large portion of its sovereign power. The company were authorized to take lands for the road, under the right of the state of eminent domain, or to take private property for public use, upon making just compensation. Upon

the assumption that the public good required the road should be built, only, could this authority be conferred. The road was to be in part in the city, and was to traverse one of the most fertile and richest portions of the state, inhabited by a numerous and wealthy population. It was supposed, and not without reason, that the road, if completed, would contribute largely to the business and wealth of the city, and benefit it beyond other portions of the state; and therefore it should aid in the work. Hence the legislature was appealed to for authority to render such aid, and the provisions in question were enacted. Not only is it apparent on the face of the provisions, it is also manifest from the public history of the road, of which the court may properly take notice, that such was the motive and design of the legislature. The work was of a public nature and for the public benefit, and authority was given to the city to aid it for the good of the public, and more especially of the city. Clearly the state might have built the road; no good reason is perceived why it might not have authorized the city to build it; and if it was competent for the state, in view of the public good, to confer such authority, why might not the state, influenced by the same motive, give authority to the city to aid a rail road company in the work. The state might, doubtless, have built the road, and assessed the city beyond the rest of the state to pay the expense; and why not authorize the city, voluntarily to assume a burthen in aid of a private company, substituted for the state in respect to the work, which the state might have imposed, if the state had taken upon itself the enterprise.

The fact that the principal part of the road is out of the limits of the city, cannot affect the question of the public nature and benefit of the work, and the power of the state to grant the authority it has assumed to give. A municipal corporation may be authorized to do an act without, as well as within, its local limits, of a public character, and relating to its government, such as building an aqueduct for conveying water into a city, or a road, or canal, in the vicinity of, and connected with its locality.

Assuming the construction of the road to be a work of a pub-

lic character, which the city might be authorized to do, it seems to be clear that it might equally be authorized to assist others in doing the work. The power of the legislature over the subject being established, the expediency or propriety of its exercise in any case, cannot be reviewed by the courts. Undoubtedly the power has been and will be abused, but the only remedy under our system is in displacing, at the earliest opportunity, all legislators who are unfaithful or incompetent, and bestowing greater care in the selection of such officers.

Another ground on which the provisions in question are claimed to be invalid is, that they are, as alleged, in conflict with the constitution. Most, if not all, of the strength of the argument to sustain this point in the case, rests upon the idea, already attempted to be refuted, that the authority sought to be conferred by them, and the object of it, are of a private and not public nature. Viewing them in a light directly the reverse, they are readily seen to be harmonious with every part of the constitution. They are provisions made in the exercise of the general power of the legislature to authorize municipal corporations to do such public acts as are required by the public good, in reference to their own territorial limits—the same power to which must be referred the grant of authority to such corporations to lay out and open streets, and keep them in repair, and make other similar local public improvements, incident to and proper for the good government of the community.

This power is clear and indisputable, and it is distinctly conceded in the opinion, in this case, of the learned justice at special term. He says, in reference to the city, the legislature "might cause all necessary streets to be laid out, opened and worked, and all local improvements to be made, and do whatever else within the locality they should deem proper for the good government of the community, and assess the expenses as a part of the public burthen upon the community, for whose benefit the expense should be incurred, or such part of the community as they should think right by reason of the particular benefits to be charged; and this power may be delegated to the common council of the city, for the locality embraced within its

boundaries." Obviously, as already stated, it is not indispensable that the improvements should be wholly within the city, for although, as a general rule, the powers of a city are to be exercised without its locality, the legislature may authorize improvements within that locality for the benefit of the city. Its power to do this is as ample as its power to create the city originally, and prescribe its limits and authority.

The 9th section of article 8 of the constitution, imposing upon the legislature the duty to provide for the organization of cities and villages, and to restrict the power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and contracting debts, by such corporations, is particularly relied on as prohibiting the legislation under consideration. The design of this section, so far as it makes it a duty of the legislature to restrict the power of taxation, &c. of cities and villages, was, in my judgment, to guard by proper limitations, against abuse in contracting debts, in the exercise of the powers granted to it by the legislature, not to limit the legislature in granting power to such corporations. If the latter had been the object, some attempt would have been made to specify and define the powers which might be granted. The subject would not have been left without specification and definition. What power may be granted? Where does the line of prohibition commence? The sections contain no answer to these questions. They are silent as to the powers which may be granted; the legislature may grant such powers as itself possesses, but must provide against the abuse of these powers, so far as relates to contracting debts, assessments and taxation.

A further objection to the validity of the legislation in question is, that the legislature had not power under the constitution, to delegate to the electors of the city, the decision of the question whether the provisions should become a law—that in respect to the expediency of the law, the legislature was made by the constitution, the sole and exclusive judge. In *Barto* v *Himrod*. (4 *Seld*. 438.) it was decided by the court of appeals, that the act known as the free school act, which contained provisions

submitting it to the electors of the state to determine whether the act should beoome a law; and making the fact of its becoming a law dependent upon approval by the people, although approved by them, was void for want of constitutional power in the legislature to commit to the people the decision whether the act should become a law. That case is relied on in support of the objection; and it is assumed, that the present case, as to the point raised, is substantially like it, and if it is, it must share the same fate. I have had some difficulty in coming to a satisfactory conclusion on the point, whether this case is within the principle of that cited, but after much and careful consideration, am convinced, that a plain and substantial distinction, requiring the application of different rules of decision, exists between the cases. Such a distinction does not, I believe, arise, from the circumstances that in the free school law, the language was that the electors of the state should determine whether this act "shall or shall not become a law," and in case a majority should be against it, the act "shall be null and void," and that in the case of the present legislation the language is, that the sections "shall not take effect," until they should be submitted to the electors of the city, and upon the event therein mentioned. Those expressions differ only in form—they import the same idea in substance.

An act does not become a law—a rule of action for the community, or any company, or individuals—until it takes effect, and when it takes effect it is a law. There is no such thing as a law *in presenti* to take effect *in futuro*. An act, to take effect in future, at a fixed time, or upon any certain event, must await the time or other event, to become a law; and especially is this true where the event upon which the act is to take effect is contingent, like a popular vote of approval. The true distinction, as I conceive, arises out of the difference in the nature of the subjects of these acts, and in the questions submitted to the decision of the people. The free school act was of a mandatory character, and imposed duties and obligations on the people which they would be bound to perform, if the act should become a law by their approval, entirely irrespective of

their will; and the question submitted to the people was whether the act should become a law; thus, as was held by the court of appeals, involving the whole subject of the propriety and expediency of the law, as well as of the strict enforcement of the various provisions, and attempting, by the legislature, to cast off the responsibility imposed upon it in the making of laws, and placing it with a majority of the people, which could not be done under the constitution. The provisions under consideration are merely permissive; they purport only to grant an authority, which the common council, if the act should become a law, would not be bound to exercise; and the question submitted to the people of the city, was, by the terms of the provisions, "whether or not, it is expedient for said city to borrow the money mentioned in said sections, for the purpose therein specified." It was not referred to the people to decide whether the authority should be granted; that the legislature had determined, if two-thirds of the electors were in favor of its being exercised. The legislature gave the authority conditioned upon a popular vote in favor of borrowing the money. The form of the vote was to be, for the rail road, and against the rail road, and a vote of two-thirds for the road was to decide that it was expedient to borrow the money, while a vote exceeding two-thirds the other way was to be a decision that it was inexpedient. It is true, that a decision in favor of the expediency of borrowing the money was to be deemed an approval of the law; as by section 292, it is declared that if the previous sections shall be approved, &c., the same shall take effect, &c., but the approval was to be implied from a vote for borrowing the money; it was not the question submitted for decision. Nothing like power to make the law was to be vested in the people; the legislature made the law dependent only on the event of the people wanting to use the authority. The ground of objection to the free school act seems, therefore, to be wholly inapplicable to this legislation; and if inapplicable, the decision referred to is no authority against it.

Again, it is conceded in the opinion in this case, at special term, and supported by the reasoning of the learned judges

who delivered opinions in *Barto* v. *Himrod*, that a legislative grant of power to a municipal corporation, with a restriction upon its exercise without the consent of the people to be affected by it, would be valid; and this is substantially a law of that character. There is no difference, in practical or legal effect, between an act conferring power to borrow money upon the event of the people deciding, in a mode provided by the act, that it is expedient to borrow, and an act vesting the power absolutely, but prohibiting its exercise, unless the people shall decide it is expedient. In neither case, do the people decide, except impliedly and by inference, upon the expediency of the law.

I perceive no objection, arising out of the constitution, to making a mere permissive law depend upon a vote of those designed to be benefited by the permission, in favor of the expediency of doing the act permitted. The whole legislative power is exerted, and the whole responsibility in regard to the law exercised by the legislature in such a case: no part of it is referred to others. In the opinions in *Barto* v. *Himrod*, it is admitted that conditional legislation, where there is no transfer of the legislative power or judgment, is allowable; and Ruggles, J., in his opinion, defines such allowable conditional legislation. He says: "the event or change of circumstances on which a law may be made to take effect, must be such as in the judgment of the legislature affects the question of the expediency of the law; an event on which the expediency of the law, in the judgment of the lawmakers, depend. On this question of expediency the legislature must exercise its own judgment definitively and finally. When a law is made to take effect on the happening of such an event, the legislature in effect declares the law inexpedient if the event should not happen; but expedient if it should happen. They appeal to no other men or man to judge for them in relation to its present or future expediency. They exercise that power themselves, and then perform the duty which the constitution imposes on them." These remarks accurately describe the law in question

The other objections taken to the validity of the law are, in my opinion, untenable.

My conclusion is, that the judgment at special term is erroneous and should be reversed.

JOHNSON, J.. (dissenting.) I entertain no doubt whatever of the power of the legislature, to enact a law, conferring authority upon the city of Rochester, or any other city or town, to make a valid subscription to the stock of a rail road corporation where the road runs through it, or terminates within its boundaries, and is calculated in some measure to contribute to the convenience and prosperity of its inhabitants. It is manifestly a subject of law, and therefore within the scope of the law-making power, unless excluded by some constitutional restriction. There is no restriction on this subject in the constitution. On the contrary, by article 8, section 9, it is expressly made the duty of the legislature to regulate and restrict the power of incorporated cities and villages, in loaning their credit, contracting debts and borrowing money, so as to prevent abuses in assessments, and in contracting debts by such municipal corporations.

If in the absence of all restriction, express authority were needed, which cannot be pretended, the whole subject is directly committed to the supervision and control of the legislature. How far their powers shall be restricted in this respect, and to what extent they may exercise such powers, without abuse, is necessarily matter of legislative judgment and discretion, exclusively. It is a question with which courts have nothing to do. It pertains in no respect to the judicial functions. If the legislature having the power, expressly grants the authority, courts cannot declare the authority, or its exercise, an abuse, without the assumption of authority which, not only naturally belongs to the law-making power, but the exercise of which is expressly enjoined by the constitution upon the legislature, as a duty. With this plain provision of the constitution before us, directly upon the subject, it is idle to attempt by inference and argument drawn from other provisions, to prove a want of power in the legisla

ture to confer this authority upon the common council. It is greatly to be feared that there is a growing disposition in our courts to control the legislative department of the government, and to weaken and curtail its authority, by loose, overstrained and doubtful interpretations of the fundamental law. Upon this question of power in the legislature, I agree fully with the court in the third judicial district, in the case of *Grant* v. *Courter*, recently decided.

I find, however, an insuperable difficulty in sustaining the authority of the common council, to borrow the money, and bind the city, by the issue of the bonds in question, upon another ground. And that is, that the legislature never exercised the power it possessed, in such a manner as to enact a valid law, but merely proposed one, which was submitted to the electors, to pass or reject as they might deem expedient and proper. In this respect the case falls directly and inevitably, as it seems to me, within the decision of the court of appeals in *Barto* v. *Himrod*, (4 *Selden*, 483.) If any principle is established by that decision it is this, that a statute, in form, enacted by the legislature, but which by its own provisions is not to take effect and become operative as a law until it shall have been submitted to the electors for their approval or rejection, and only in the event of its receiving a favorable vote from them, is unconstitutional and void. It proceeds upon the ground, as will be seen by referring to the opinions delivered, that in such a case the legislature does not exercise its law-making sovereignty, but attempts to delegate it to the electors, to be exercised by them.

That the sections of the amended city charter (*Sess. Laws of* 1851, *ch.* 389) purporting to give this power to the common council, are in direct contravention of this principle, cannot, as it seems to me, be doubtful. It is expressly provided by section 291, that the preceding sections, 285, 286, 287, 288, 289, 290, together with 291, "shall not take effect until they shall have been submitted to the electors of the city of Rochester, qualified to vote for charter officers of said city, at a special election, which shall be held in said city at such time as the common council shall direct, of which ten days' previous notice shall be

given by advertisement to be inserted in all the daily newspapers published in said city, for the purpose of determining whether or not it is expedient for said city to borrow the money mentioned in said sections, for the purposes therein specified." The form of the ballots is there prescribed; "for the rail road," and "against the rail road." And it is provided that those ballots on which shall be written or printed the words "for the rail road," shall be deemed to approve said sections, and those "against the rail road," shall be deemed as not approving them. The votes were to be canvassed by the inspectors of election in the several wards, and the result certified and returned to the clerk of the common council. The return was to contain the aggregate number of votes, and to designate how many were for the rail road, and how many against the rail road. The mayor and clerk of the common council were then to canvass the votes thus certified and returned, and make and file in the office of said clerk their certificate that the said sections were approved or were not approved, as the case might be, by the votes of two thirds of the electors voting at said election. Section 292 further provides, that if the said sections should be approved by two-thirds of the votes of the electors voting at such election, they should take effect immediately after the filing of the certificate. The amended charter, of which these sections were in form a part, by the 293d section took effect immediately. But the sections in question which contained no part of the ordinary powers of the common council, but were designed to confer an extraordinary power upon this particular subject, did not, by the express terms of the enactment, take effect immediately, and whether they should ever take effect was made to depend entirely upon the contingency of their receiving the favorable vote of two-thirds of the electors voting, and the making and filing of the certificate that they had been approved, by the mayor and clerk. If no election had been held, or if when held the vote had been one of disapproval, the sections would never have taken effect, but remained without force or authority, the same as though they had never been enacted in form. This was the precise difficulty with the free school law. By its own terms it could

never have the force or authority of law, until it had received the assent of a majority of the votes of the voters at an election. So here it was the sections themselves which were submitted for approval or disapproval, and it was a favorable vote alone which could give them any vitality or force. The limitation was directly upon the grant of power, and not upon its exercise after the grant had taken effect, and vested the power in the common council. The vote determined whether there should or should not be any grant. And it was in reference to this precise condition of the provisions of a statute emanating from the legislature that the court of appeals said, in the case above cited: "They were not law or to become law until they had received a majority of the votes of the people at a general election in their favor, nor unless they received such majority. It results therefore, unavoidably, from the terms of the act itself, that it was the popular vote which made the law. The legislature prepared the plan or project and submitted it to the people, to be passed or rejected. The legislature had no power to make such submission, nor had the people any power to bind each other by acting upon it." And Chief Justice Ruggles, in his opinion, even goes so far as to say, that if the act had by its terms been declared to be law from the time of its passage, to take effect in case it should receive a majority of votes, in its favor, it would nevertheless have been invalid, because such vote would have involved the expediency of the law, and is not such an event as a statute can be made to take effect upon according to the meaning and intent of the constitution. "It is not denied," says the learned chief justice, "that a valid statute may be passed to take effect upon the happening of some event certain or uncertain. But such a statute, when it comes from the hands of the legislature, must be law *in presenti* to take effect *in futuro*." It is argued that these sections so far took effect, when they came from the hands of the legislature, as to be in some sense law *in presenti*. But this I apprehend cannot be so. When the legislature said they *should not* take effect except in a certain contingency, and should take effect when that happened, they said the sections should not be a law unless the

event happened. Until then it was no rule for the government of any one. No one could violate it, nor acquire any rights, or exercise any authority under it. It vested no power to be exercised, and no one could do any valid, or binding act, under it. How then can it be deemed a law in any sense? A law is a rule of conduct, imposing duties and obligations upon the citizen, which is capable of being violated, and under which he may acquire and enjoy rights. Suppose this same provision had applied to the whole amended charter, would it have been law, until the election had been held, and the certificate of a vote of approval filed? Clearly not. The old charter would have remained in full force and been the sole and exclusive law of the corporation until the happening of that event. Indeed a statute passed to take effect at a future day, is not law *in presenti*, in any just sense in which the term law can be used. It is an enactment which is to become law at the day appointed, but in which all vitality is suspended, or rather from which it is withheld, by the power which created it, until the appointed time.

Every lawyer understands that a statute passed by the legislature, in which no time is prescribed, does not commence, or take effect as a law, in any part of the state, until the twentieth day after it comes from the hands of the legislature. This is regulated by a general provision of law, to which all enactments, not specially provided for, are subject. (1 *R. S.* 144, § 12.) It is no law for any purpose, or in any conceivable sense, until the twenty days have elapsed. To say therefore of a statute that it is law *in presenti* to take effect *in futuro*, is simply saying that it is law now, to become law hereafter, which is a solecism, and a proposition which destroys itself.

It is urged that laws passed for the government of the inhabitants of a village or city, stand upon a different footing from those passed for the government of the whole people of the state; and that a submission to the electors, which would render a general law void and of no effect, would not affect injuriously, a local law. But I am unable to see any ground on which such a distinction can possibly rest. It is simply a question of power in the legislature, under the constitution. No

one pretends that the constitution has, by any terms prohibited it in the one case, and allowed it in the other. The power of the legislature is manifestly the same in both cases. If it has no power under the constitution, to submit a law for approval or disapproval to the electors in the one case, it has not in the other; and if the electors have no power to bind each other, by acting upon the submission in the one case, they have not in the other. The legislative power of the state is vested in the senate and assembly for the purpose of enacting local, as well as general laws, and must be exercised in the same manner in either case, and any thing in form or substance which would avoid one, would the other, in all cases where the constitution has not prescribed a different rule. The power must be exercised as fully and completely in a statute relating to the construction of a rail road by a corporation, as in one relating to common schools and general education.

But for this decision of the court of last resort, in *Barto* v. *Himrod*, I should have no doubt that it was not only perfectly competent for the legislature to pass a valid law in this form, but that it was highly expedient and proper in that body, to consult the electors on a question like this, before delivering them over bound, to the common council. The constitution, (*art.* 7, § 12,) expressly declares that no statute, creating a debt against the state shall take effect until it shall, at a general election, have been submitted to the people and received a majority of all the votes cast for and against it at such election. And the court in the case referred to, seem to have held that the constitution, by requiring a submission in a given case, had impliedly forbidden it in all others. But with all possible respect for that court and the learned judges who delivered the opinions, it seems to me that the maxim *expressio unius est exclusio alterius*, is not at all applicable to the provisions of a constitution restricting the exercise of a sovereign power. Indeed it has always appeared to my mind, that that provision of the constitution had just the contrary effect. It is plainly a limitation upon the legislative power upon a given subject, and nothing more. It is clearly not legislative power

reserved to the electors, any more than the executive right to sanction or negative, is legislative power conferred upon the governor. In either case, it is simply a check or limitation upon legislative power otherwise fully granted. All the legislative power of the state is vested in the two bodies which compose the legislature. None of it is reserved to the people to be exercised, and none is vested in the governor. A check or limitation upon a given power, is quite a different thing from the power itself, not only in its nature, but in its exercise. And when we consider that before the adoption of the present constitution, the legislature had repeatedly passed laws in this same form, and that the constitution, so far from forbidding the practice enjoined it as an imperative duty in a single case, the just inference would seem to be, that it was rather designed to leave the legislature to exercise the same power in all other cases, at its discretion. It is quite certain that the constitution nowhere forbids the passage of laws, by the legislature, to take effect only upon receiving the approbation of a majority of the electors upon whom they are to operate, in the form of a ballot deposited at an election, unless it is in the provision making such a submission imperative in a particular case. Indeed, such a prohibition would be in singular contrast with the whole spirit and theory of our government. The consent and sanction of the governed, has heretofore been supposed to add force and validity to statutes, instead of rendering them null and void.

I have bestowed no inconsiderable reflection upon this subject, since this novel theory was first broached, that the submission of a statute, enacted in due form by the legislature, to the people for acceptance or rejection in some prescribed form, rendered it a nullity. Without being able to comprehend, clearly, the principles upon which it has been held to rest, I have not been able to see at all, why it is that the law-making body, in the absence of all constitutional restrictions, may not, in the plenitude of its sovereignty, properly exercise its power, subject to such checks and limitations as it may see fit to impose. And this is virtually conceded when it is admitted that a valid

law may be passed to take effect upon the happening of a future contingent event. The legislative sovereignty is just as fully and completely exercised by an enactment in that form as in any other. It is of the very nature and essence of sovereignty to exercise its powers absolutely or conditionally as it may choose. It may enact absolutely, and bind the elector, even against his will, and in known and intentional hostility to it; or in accordance with his wishes, and subject to his approval and acceptance. It is by no means essential to the full and proper exercise of sovereign power, that it should be exercised in opposition to the will of the governed. The sovereignty is quite as fully, and indeed more strikingly manifested, when exercised in accordance with the elector's will, and subject to his approval or acceptance. The requirement of the approval or assent of the elector, as the condition of an enactment's taking effect and becoming operative as a law, is no delegation of legislative power to the electors, as seems to have been supposed. And the elector's act of approval by his vote, has not the quality of, nor does it purport to be, an act of sovereignty. It is an act simply of assent or obedience, and serves only to remove the check or limitation to the full and free operation of the supreme will. It operates as a secondary means, simply, devised and employed by the sovereign to express his own will, and render it absolute. And it is the sovereign will, embodied in the enactment, and not the secondary act of approval by the elector, which makes the law, in such a case. For instance, A. and B. enter into a contract which is full and complete in all its parts and provisions, and signed by the parties. But in it they insert a condition or proviso, that it shall not take effect and become binding, until it has been submitted to C. and he shall have indorsed his approval upon it, or his opinion that it is in due form, or not contrary to law. It is no contract until it has C.'s indorsement, and yet C. does not make it, nor is any power delegated to him to bind the parties by contract. It is still the sole act of A. and B., and it is their will which binds, and C. acts only secondarily as an instrument or adviser. And so I conceive that were an act passed by the legisla

ture, with a proviso that it should not take effect and become a law until it had been submitted to the court of appeals, and the requisite number of the judges had concurred in, and filed an opinion that its provisions were not in conflict with any provision of the constitution, the court of appeals by this act would not make the law, nor would any legislative power be delegated to them in such a case. Their act would simply fulfill a condition, and remove a check, and it would still be the legislative will, which had employed these secondary means, that would create and constitute the law. This illustrates, in my judgment, the clear and plain distinction between a check devised and imposed by the supreme will, upon the operation of its own decrees or enactments, and the delegation of sovereign power. And it is by overlooking this distinction, that acts like the one under consideration have been held to be invalid. And whether the condition upon which an enactment is to take effect and become a law be the approval of the act, by a majority of the electors, or the sanction of the court of appeals, or the happening of some uncertain event in future, each and all are of the same nature and character precisely, and operate in the same manner upon the enactment.

The logic of the opposite theory is exceedingly brief. It is substantially this: By the terms of the enactment it is no law without the required assent; therefore, the act of yielding assent creates the law, and operates as the law-making power. This may seem plausible; but it must be seen in the end, I think, to be utterly delusive and unsound. The assent or dissent is a subordinate and not a sovereign act, and in its nature, character and office, is precisely like the executive sanction or negative, which is in no sense the exercise of law-making power. With this difference, however; that in the one case the check on limitation is devised and imposed by the authors of the constitution, the ultimate sovereigns; and in the other, by the law making power, upon its own acts, in the exercise of its unrestrained sovereignty. And so, too, in my judgment, it is no evidence whatever that the legislature did not pass upon the expediency of a statute, or exercise the sovereign judgment in

reference to its expediency, because they ordained that it should not take effect without its receiving the assent of a majority of the electors. I should infer from such an act, that the legislature had not only exercised their own best judgment, upon the question of its expediency, but to make assurance doubly sure, had determined to consult the judgment of the electors, also. The highest possible considerations of the expediency of enacting a particular statute, are often involved in the question of what is the public sentiment in regard to the principle embodied in it. Can it be enforced? The most salutary laws are often rendered in a measure powerless and ineffectual, because opposed to the sentiments or habits of a majority of the governed. And whether the legislator consults the elector beforehand, and enacts an absolute statute, in accordance with the elector's wishes, or not consulting him beforehand, passes the same act, conditioned to take effect upon its receiving the sanction of the electors afterward, it is the same in substance and effect, and in either case it is the legislator and not the elector, who determines in regard to the fitness and expediency of the law. The essential fact in both cases is, that the will of the sovereign acts in harmony with that of the subjects of the law, and the underlying principle is not at all changed by the circumstance that in one case the sovereign adopts the petition, and in the other, makes his enactment effectual on condition only of its receiving the elector's sanction in the form of a ballot. And, to my mind, it is not a little difficult to discover upon what principle it is, either in government or philosophy, that the assent of the subordinate nullifies the accordant will of the superior's power. Upon grounds of policy and expediency, I am certainly opposed to the enactment of laws in this form, on all subjects of ordinary and common legislation. But upon questions of this character, involving large burthens of debt, and consequent taxation, for a long period, it would seem not only just, but politic, that the electors should be consulted, and their assent obtained, before the burthens are irretrievably fastened upon them. To the judicial mind, however, it is simply a question of power, on the part of the legislature, to con-

fer with the electors, and to annex such conditions precedent to their enactments, as the assent of the electors. And questions of policy and expediency can in no respect be permitted to affect it. The court of last resort has said that the legislature had no power to submit a statute to the electors, and that the electors had no power to bind each other by acting upon the submission, within the meaning and intent of the constitution. And whether the constitution really says or means this, or is merely made to mean it, by an unwarrantable rendering of the instrument, the decision is binding upon all other courts while it shall remain unreversed. I confess that the restriction appears, to my mind, rather a judicial than a constitutional one, but I am not at liberty so to hold, and have no desire to evade the just force and authority of that decision. If that court were in error, as it is not impossible they may have been, in that decision, it is their province, and not ours, to correct it.

I find myself constrained, therefore, by the rigor of the maxim *stare decisis*, to hold that the sections of the statute in question were never properly enacted by the legislature, and never had any force or authority as law. And consequently, that the bonds issued under them were void and the action properly brought. The judgment should therefore be affirmed.

Judgment reversed.

[Cayuga General Term, June 1, 1857. *Johnson, T. R. Strong, Welles* and *Smith*, Justices.]

24 510
29 435
27a 351

YOUNGS and others *vs.* WILSON and others.

A subsequent incumbrancer who looks at the record is entitled to all the information which the parties to a mortgage can reasonably impart. He is entitled to know the real extent or amount of the debt which the mortgage is given to secure.

A mortgage given to save harmless and indemnify the mortgagees, and each of them, of and from all liabilities which they or either of them had at any time theretofore contracted to and for the mortgagor, "either as surety, indorser, guarantor or otherwise, whether now due or yet to grow due, and from all damages, costs and charges on account of the same," is fraudulent and void as against creditors, for its vagueness and uncertainty in respect to the debt or debts it is intended to secure.

APPEAL from a judgment entered at a special term, upon the report of a referee. The action was brought to foreclose a mortgage given by M. W. Eastman to George Youngs and Abel Hunt, on the 4th of June, 1849. The mortgage expressed a consideration of $2400, and contained the following condition: "Provided always, and these presents are upon the express condition, that if the said Moses W. Eastman, his heirs, executors or administrators, shall well and truly pay and save harmless and indemnify the said George Youngs and Abel Hunt, and each of them, of and from all liabilities which they or either of them may have at any time heretofore contracted to and for the said Moses W. Eastman, either as surety, indorser, guarantor or otherwise, whether now due or yet to grow due, and shall save harmless the said George Youngs and Abel Hunt, and each of them, of and from all damages, costs and charges on account of the same," &c. The referee before whom the cause was tried found that the plaintiff George Youngs had paid, as surety for the defendant Eastman, debts and liabilities intended to be secured by the bond and mortgage set forth in the complaint amounting to $775.55, which amount was due to him in his own right, with interest; and that the plaintiffs George Youngs and Abel B. Hunt, as executors of Abel Hunt deceased, were entitled to recover for liabilities incurred by Abel Hunt in his lifetime, and for which they were liable as executors, the sum of $314.99 with interest; which liabilities were secured by the said bond and mortgage. And a judgment was entered, for

the foreclosure of the mortgage, and directing the mortgaged premises to be sold, for the payment of the amount so adjudged to be due to the plaintiffs, with costs. From this judgment the defendants appealed.

D. B. Prosser, for the appellants.

B. Franklin, for the respondents.

By the Court, E. DARWIN SMITH, J. The questions of law and fact in this cause raised and passed upon at special term, I think were rightly decided. Upon the assumption on which the case was there tried I can see no error in the decision or in the decree then made. But a new point is now here raised for the first time in the progress of the cause; to wit, that the mortgage is fraudulent and void as against creditors, for uncertainty in respect to the debt or debts it was intended to secure. The mortgage was given to save harmless and indemnify the mortgagees and each of them of and from all liabilities which they or either of them had at any time theretofore contracted to and for the said Moses W. Eastman, "either as surety, indorsee, guarantor or otherwise, whether now due or yet to grow due, and from all damages, costs and charges on account of the same." The condition is the same in both the bond and mortgage. The mortgage is a security for existing debts then contracted, not for future advances or for liabilities thereafter to be incurred. The question is whether a mortgage given with a condition thus general and vague is valid under the registry act, as against subsequent creditors. It is the policy and object of the registry acts to make the records show the actual state of the title to real estate, with the incumbrances thereon, that subsequent grantees or incumbrancers may be able to ascertain *with certainty*, in respect to mortgages, the extent of the liens or incumbrances thereon. (7 *John. Ch. Rep.* 16.)

"It is necessary," says Chancellor Kent. (4 *Cowen*, 176.) "that the agreement as contained in the record of the lien should give all the requisite information as to the *extent* and

certainty of the contract, so that a junior creditor may, by inspection of the record and by common prudence and ordinary diligence, ascertain the extent of the incumbrance." This passage has relation chiefly to the case of a mortgage given as security for future advances. In such cases the condition of the mortgage must necessarily be more indefinite than when it is given for a certain and ascertained debt. It was held by the chancellor, in *The Bank of Utica* v. *Finch*, (3 *Barb. Ch. Rep.* 293,) that a mortgage or judgment given to secure future advances or a floating debt should be taken for a specified sum of money sufficiently large to cover the amount, and that in that form the mortgage or judgment would be valid to the extent of the amount specified therein. (*See also* 7 *Cranch*, 50; 2 *Selden*, 100; *Truscott* v. *King*, 6 *Barb. Rep.* 346; 16 *John.* 165.) This vagueness or uncertainty in regard to the real amount for which a judgment or mortgage is actually held as security in such cases is unavoidable. It necessarily results from allowing securities to be given for contingent liabilities, uncertain balances of debt and for future advances, which is a species of security clearly allowable. (3 *Cranch*, 61.) But these qualifications and doubtful suggestions all apply to cases where uncertainty is incident to the very nature of the transaction, and imply that where there is no occasion for such uncertainty, in the condition of a mortgage, it is not to be allowed. The subsequent incumbrancer who looks to the record is entitled to all the information which the parties to a mortgage can reasonably impart. He is entitled to know the real extent or amount of the debt which the mortgage is given to secure. That is notice to him. (1 *John. Ch. R.* 298. 2 *John. R.* 506.) This point has been expressly settled in several cases in Connecticut. In *Hart* v. *Chalker*, (4 *Conn. R.* 79,) Chief Justice Williams states the rule as follows: "If a mortgage is given to secure an ascertained debt, the amount of that debt ought to be stated; and if it is intended to secure a debt not ascertained, such *data* must be given respecting the debt as will put one interested in the inquiry upon the track leading to a discovery; and if given to secure an *existing* or *future liability*, the foundation of such liability must be set

forth." In 6 *Conn. Rep.* 40, the expression in the condition of a mortgage, that it was to be security "for any and all other notes hereafter indorsed" was held to be altogether too indefinite. In *North* v. *Belden*, (13 *Conn. R.* 380,) it is said that one principle seems to be definitely settled, that the real nature of the transaction, so far *as it can be disclosed*, must appear upon the record. (5 *Conn. R.* 442. 8 *id.* 221.) Applying the test of these decisions to the present case, this mortgage cannot be upheld. When it was given, the debts or liabilities for which it was given were ascertained and were known. They could have been stated in the condition of the mortgage. If the liabilities were contingent, the foundation of such liabilities could have been set forth. If such a loose condition in a mortgage can be sustained, as was said by Chief Justice Williams in *Hart* v. *Chalker*, (*supra*,) it must be sufficient to say "This mortgage is given to secure a debt due." It is apparent that if mortgages with such loose construction can be supported they may be made a most fruitful contrivance to practice and cover fraud. No certain debt is secured by this mortgage, and room is left open for the getting up of new debts and claims, and the substitution of one debt for another, fictitious or real. I think the judgment in this case should be reversed and the complaint dismissed; but as the point on which we reverse the judgment might have been taken by demurrer, or in an earlier stage of the cause, and the costs are in our discretion, I think neither party should recover costs as against the other. Judgment reversed and complaint dismissed, without costs to either party.

[Cayuga General Term, June 1, 1857. *Johnson*, *T. R. Strong* and *Smith*, Justices.]

24 514
7h 673

PIER *vs.* FINCH and others.

The possession of a rail road passage ticket is *prima facie* evidence that the holder has paid the regular price for it, and of his right to be transported, at some time, between the places specified thereon, on some passenger train. And if it is unmutilated, the presumption is, that it has never been used for that purpose. It is therefore evidence of the agreement or undertaking of the corporation to transport the holder to the place mentioned, on its passenger cars, for a consideration by him paid.

The words "*good this trip only*," upon a passage ticket, will not limit the undertaking of the company to any particular day, or any specific train of cars. They do not relate to *time*, but to a *journey*; and if the ticket has not been previously used, it entitles the holder to a passage on a subsequent day, as well as on the day it bears date.

THIS action was for an assault and battery alleged to have been committed by the defendants, on the plaintiff, in forcibly putting him out of a passenger car, on the New York and Erie rail road. The defendent Finch was the conductor of the train, and the other defendants, Manville and Curran, were brakemen, who acted as the assistants of the conductor in removing the plaintiff. The plaintiff was put off for refusing to pay his fare. He held, and offered to the conductor, a ticket in the words and figures following: "New York and Erie Rail Road. Corning to Elmira. Please keep this in sight. Good this trip only. Oct. 19, 1854.

No. 46. G. L. DUNLAP."

On each corner of the ticket was a letter printed, indicating the several divisions of the rail road. The plaintiff offered this ticket to the conductor as evidence of his right to the passage. The other facts are sufficiently stated in the opinion.

The plaintiff was nonsuited on the trial, and appealed from the judgment.

G. B. Bradley, for the plaintiff.

Diven, Hathaway & Wood, for the defendants.

By the Court, JOHNSON, J. The plaintiff, on the 25th of December, 1854, took a seat in one of the passenger cars on th

New York and Erie rail road, at Corning, for Elmira, and some two or three miles east of Corning, was forcibly put off the train, by the conductor and the other defendants in his employ. The only cause alleged for the removal of the plaintiff from the cars, was his refusal to pay to the conductor his fare for that trip. It appears from the evidence, that when the conductor demanded the fare, the plaintiff produced and offered to him the ticket copied into the case, as evidence of the payment of his fare, and of his right to be carried one trip to Elmira, by the owners of the cars. The ticket was not mutilated, and the plaintiff told the conductor that his wife had purchased it at the office, and that it had not been used by any one.

It also appeared, in connection with this, that it is the custom on the New York and Erie rail road, for the conductor, when the ticket is first shown, to tear off the corner representing the division of the road on which it is first presented. The conductor refused to receive the ticket, on the ground that it was dated several days previous. The plaintiff refused to make any other payment, and was put off. The ticket thus offered bore date the 19th of October, 1854, and it was admitted by the defendants that it had been issued by the authorized agent of the rail road company, and was in the customary form of tickets sold to passengers on that road. It was also admitted by the defendants, that at the date of the ticket the company were running three passenger trains daily each way, over their road between Corning and Elmira. The judge nonsuited the plaintiff, on the ground that the ticket held and presented by him was only evidence of his right to ride in the next passenger train, going from Corning to Elmira, after the purchase of the ticket; or, at all events, the right was limited to the day on which the ticket bore date, and the ticket could not be used on a subsequent day.

The case is not embarrassed by any evidence of the custom of the company or the conductors of the trains, and turns wholly on the construction to be given to the ticket. The possession of the ticket by the plaintiff, was *prima facie* evidence that he had paid the regular price for it, and of his right, at some

time, to be be transported from Corning to Elmira on some passenger train; and as it was unmutilated, the presumption is, that it had never been used for that purpose. The ticket, then, in the plaintiff's hands, and on which he claimed the right to ride on that occasion, was evidence of the agreement or undertaking of the corporation, to transport him to Elmira on its passenger cars, for a consideration by him paid. And the precise question to be determined is, whether upon the face of the ticket, and by its terms, the undertaking was to carry him on any passenger train on which they could conveniently transport him, and which he might choose to take, at any time subsequent to the purchase of such ticket; or whether the undertaking was limited to some particular train, or within some definite period of time. It does not appear at what time the ticket was purchased by the plaintiff, though the presumption I suppose is, that it was purchased at some time, on the day on which it bears date, but not at at any particular hour of the day. It may have been purchased, for aught we can know or presume, for this purpose, before either of the three trains passed eastward on that day, or after they had all passed. The words which are supposed to limit the undertaking to some specific train of cars or period of time, and the only words which are claimed to have that effect, are "good this trip only." It is quite apparent, I think, that these words have no reference to any particular day or hour whatever. They do not relate to time, but to a journey. "*This trip.*" What trip? A trip, in its ordinary signification, means a journey, jaunt or excursion by some person; and as the ticket is given to the passenger as evidence of his right, "this trip," must be construed to mean the journey such passenger proposes to make, and does not become operative until he undertakes it. When the purchaser commences his trip, and becomes a passenger, the ticket is good for that trip and no other; and at the end of the trip the conductor has the right to demand, and the passenger is bound to surrender, the ticket. The passenger cannot use it for any other trip, and has no longer any right to the possession of it. This construction gives full effect to the language, and works no injury to

any one. A construction which would work a forfeiture of a right, which the plaintiff clearly had, for a valuable consideration paid, and which would enable the corporation to retain the consideration without performing the service, ought not, it seems to me, to be given to this language, if it is fairly and reasonably susceptible of any other. If it is susceptible of two interpretations, that should be preferred which will secure and preserve the rights of both parties, according to all canons for the interpretation of contracts. But I am unable to see how this language can be construed into a limitation in respect to time. If time was intended, it would have been "good this day only," or some specified number of hours or days; but it is a *trip*, and not a time which is mentioned. It is equally difficult, I think, to apply this language to the passage of any particular train of cars over the road. In order to apply it to the passage of a particular train, it is necessary to presume that the ticket was purchased and delivered to the plaintiff when the cars were present, ready to start, which would be a strained and unwarranted presumption. And if it had been intended to limit the performance of the undertaking to the running of any particular train of cars, the more appropriate language obviously would have been "good the next train only," or some other train indicated by the hour of its expected arrival or departure. It will be seen, I think, that "this trip," from Corning to Elmira, refers much more naturally and properly to the journey of the plaintiff, from one point to the other, than to the passage of any particular train of cars over the whole road. It limits the plaintiff's right of passage to the trip which he commences and undertakes to make, under the contract, and his right to the possession of the ticket, to the time when it is customary to surrender it according to the usages on that road. (*See The Northern Rail Road Co.* v. *Page*, 22 *Barb. Rep.* 130.) The language was the same on the ticket in that case. It was held there, that the defendant was bound to surrender his ticket when demanded, according to the established custom, in exchange for the conductor's check, or pay his fare to the conductor. And this was upon the ground that if the defendant

was permitted to retain his check, it would be evidence of his right to another passage, or any number of them, on some future occasion. The precise point here presented was not involved in that case, but the reasoning of the court bears directly upon it. It was not pretended on that occasion, by the conductor, nor is it here, that the plaintiff could not be transported as conveniently by the corporation on that train of cars, as on any one running on the day of the date of the ticket. The ground taken, and on which the plaintiff was ejected, was, that he had no right to a passage on that train, which had been purchased and paid for on some previous day. And this was the ground of the nonsuit. This, in my judgment, was an erroneous interpretation of the undertaking of the corporation, as evidenced by the ticket. The ticket *prima facie*, was evidence of the plaintiff's right to that passage or trip, and the conductor had no right to demand fare and refuse the ticket when offered. It follows that the plaintiff was put off from the train wrongfully, and the action is well brought. The judgment must therefore be reversed, and a new trial ordered, with costs to abide the event.

[Cayuga General Term, June 1, 1857. *Johnson*, *T. R. Strong* and *Smith*, Justices.]

24 518
64 640
51h 109

BURT, receiver of the Lake Ontario, Auburn and New York Rail Road Company, *vs.* HIRAM S. FARRAR.

A rail road corporation formed under the general rail road act, is not formed, and does not become a legal body, until all the requirements of the statut have been complied with, and the articles filed in the office of the secretary of state.

Until this has been done, the subscription of any person to the articles is a mere proposition to take the number of shares specified, of the capital stock of the corporation thereafter to be formed, and not a binding promise to take and pay.

Burt *v.* Farrar.

As an obligation, it is inchoate, and can never become of any force or effect unless the articles are filed and the corporation created.

While the articles remain in the hands of a subscriber, before being filed, he may erase his subscription, entirely, or modify it as he sees fit.

MOTION for a new trial, on a bill of exceptions. The action was brought to recover the balance remaining unpaid on a subscription by the defendant, for twenty shares of the capital stock of the Lake Ontario, Auburn and New York Rail Road Company. The subscription was to the original articles of association. The defendant, and seven other individuals, agreed between themselves to subscribe the articles of association for twenty shares, each, and all made such subscription. The shares were $50 each. After the articles were thus subscribed, they were put into the defendant's hands to enable him to obtain other subscribers. While the articles were in his hands, he solicited and obtained subscriptions from some 60 or 70 other individuals, and before delivering them up to be filed, altered his own subscription from twenty shares to two shares. The alteration was not discovered until after the articles of association were filed. The defendant paid to the treasurer $100, which was ten per cent on the original subscription, and the full amount of two shares. After the alteration, and the payment of the $100 the articles were filed, according to law, and the corporation duly created.

The justice at the circuit, after the plaintiff's counsel had stated the foregoing facts, in his opening, nonsuited the plaintiff, who excepted to the decision and moved for a new trial on a bill of exceptions.

Geo. Rathbun, for the plaintiff.

W. T. Worden, for the defendant.

By the Court, JOHNSON, J. The object of signing the articles by all the associates, doubtless, was to effect the formation of a rail road corporation. But the corporation was not formed and did not become a legal body until all the requirements of

the statute had been complied with, and the articles filed in the office of the secretary of state.

Until all this was done, the subscription of any subscriber to the articles was, I think, a mere proposition to take the number of shares indicated by the subscription, of the capital stock of the corporation thereafter to be formed, and not a binding promise to take and pay. As an obligation, it was inchoate, and could never become of any force or effect unless the articles were filed and the corporation created.

While the articles remained in the hands of the subscribers, or either of them, I see no reason why the defendant might not erase it altogether, or modify it as he saw fit. He may have acted in bad faith with his associates, but that is not the question here. A party may always withdraw or modify a proposition to enter into any obligation or relation, before it has been accepted by the other party. When the corporation was created the defendant's subscription took effect and became binding, and not before. And the defendant then became the owner of the shares he had agreed to take. This was determined by the articles as they stood at the time of filing. It is clear, I think, that the defendant, when the corporation came into being, could only have claimed two shares of the capital stock, and I do not see how the board of directors could have awarded him any greater number, without a new subscription. This being so, it must follow that the action cannot be maintained to recover the amount of the eighteen shares.

The obligations between the corporation and the subscribers to the stock are mutual, and the corporation cannot collect for shares which the defendant had no right to claim, and which it had no power to award and deliver to him.

The nonsuit was therefore right, and a new trial must be denied.

[Cayuga General Term, June 1, 1857. *Johnson*, *T. R. Strong* and *Smith*, Justices.]

24 521
35 94
46h 410

THE PEOPLE, *ex rel.* Uriel M. Rhoades and Sophia Rhoades *vs.* GEORGE HUMPHREYS, county judge of Cayuga county.

The general doctrine that the right of a father to the custody of his minor children is paramount to that of the mother, is well settled.

He may forfeit that right by misconduct, or lose it by disqualification, and it may be suspended by reason of the tender age of the child and its welfare requiring that it be with the mother. But a strong case must exist, to warrant the depriving him of this right, even for a limited period.

Where the wife has separated from her husband without any sufficient excuse, she ought not to have the custody of her child, unless the health and present condition of the child imperatively require it.

The revised statutes (2 *R. S.* 148, 149, §§ 1, 2) do not confer upon county judges any authority to entertain proceedings by habeas corpus, in behalf of a wife, living in a state of separation from her husband, respecting the custody of a minor child. The supreme court alone—not a justice of that court nor a county judge—is invested with the power given by those sections.

Nor does the 86th section of 2 *R. S.* 575, which declares that the several provisions contained in the title relating to writs of habeas corpus shall be construed to apply, so far as they may be applicable, and except when otherwise provided, to every writ of habeas corpus authorized to be issued by any statute of this state, extend the power specially granted to the supreme court by 2 *R. S.* 148, §§ 1, 2, to the county judge.

Under the provisions of the revised statutes authorizing the removal of proceedings had before any officer into the supreme court by *certiorari*, (2 *R. S.* 563, § 69,) the court has authority to examine and correct any erroneous decision of the officer upon a question of law.

CERTIORARI, to remove proceedings had before the county judge of Cayuga county, upon *habeas corpus*. The *habeas corpus* was sued out by Azubah Rhoades, for the purpose of having the custody of her infant child delivered to her. The child was less than six months old, and had been taken from the mother by its father, Uriel M. Rhoades, and put in charge of his mother, Sophia Rhoades. The county judge ordered and decreed that the child be delivered over to its mother.

W. T. Worden, for the relators.

D. Wright, for the defendant.

By the Court, T. R. STRONG, J. The marriage between Azubah Rhoades and Uriel M. Rhoades took place in January,

1853; and they lived together as husband and wife until the 1st day of April, 1856, when the wife, without the consent of her husband, separated from him, and has since resided with her parents. A female child of the marriage was born on the 12th day of October, 1855, which was, on the separation, taken by the husband to the house of his parents, and placed in the care of his mother. On the 4th day of April, 1856, the wife presented her petition to the county judge of Cayuga county, for a writ of habeas corpus to obtain the custody of the child, and thereupon such a writ was allowed by the county judge, upon which the husband, and his mother, to whom the writ was issued, came before the judge and made return to the writ, to which the wife replied, denying several matters stated in the return. After a hearing before the judge, in which several witnesses were examined on each side, it was adjudged and directed that the wife was entitled to the custody of the child, and that it be delivered to her. This decision it is now sought to have reversed.

The evidence in the case satisfactorily establishes, that the wife had no justifiable cause for leaving her husband. His conduct towards her has been far from uniformly correct; he has been wanting in respectful and kind attentions to her, and has often used harsh, profane and vituperative expressions to her, and to others concerning her, but he has been guilty of no such misconduct as would justify the wife in a separation. The expressions referred to have been made in ebullitions of passion, and have always been mere general angry remarks and charges, not imputing any specific wrong. There is no proof or pretense that he has used or threatened any violence to her person, or failed to provide for his family in a suitable manner, or that it would be unsafe for her to cohabit with him. A complaint by the wife for a separation or limited divorce could not, upon the facts disclosed, stand a moment.

It is apparent from the case that the wife has furnished strong provocation for the misconduct of the husband. Her treatment of him appears to have been very annoying and calculated to test severely his patience. She has often been disrespectful

and unkind towards him, and in an angry, violent and unbecoming manner, made serious accusations against him; and on one occasion she gave him a blow with her hand. It is not too much to say, that her conduct in the marriage relation has been at least equally blamable with that of her husband. Both have, much to their discomfort and discredit, too readily allowed themselves to engage in family jars, and reproaches of each other, which have been quite frequent, and some of the legitimate fruits are experienced in the separation which has occurred, and in this litigation.

Regarding the wife as having separated from her husband without any sufficient excuse, she ought not to have the custody of the child, unless the health and present condition of the child imperatively require it. Public policy, the sacredness of the marriage relation, and good morals, dictate that the motive to a return to her duty by the wife, arising from the possession of the child by the husband, should not be removed, unless such a necessity exists.

The general doctrine, that the right of a father to the custody of his minor children is paramount to that of the mother, is well settled. He may forfeit it by misconduct, or lose it by disqualification, and it may be suspended by reason of the tender age of the child, and its welfare requiring that it be with the mother. A strong case must exist, to warrant the depriving him of this right, even for a limited period. These views will be found fully supported in *The People* v. *Mercein*, (3 *Hill*, 399, *and the cases there cited.*)

The only difficulty, if any, in the present case, in regard to the right of the father to retain the child, arises from the child being of tender age, and deriving its sustenance, in part, from the breasts of the mother. But upon the evidence, I think these circumstances form no obstacle to the father's right. The mother had not sufficient milk for the child; it was, in part, sustained by feeding; it was placed by the father with a competent person; and down to the hearing on the habeas corpus, some ten days after the separation, had been doing well and growing

fleshy; and besides, the husband was willing at any time, on the wife returning to him, to provide for her, and allow her the care of the child.

I think therefore, on the undisputed facts of the case, that the father had the legal right to the custody of the child, and that the county judge erred as to the law of the case in awarding the custody to the mother.

So far as the proceedings before the county judge, and his decision, are sought to be sustained under sections one and two of the 2 *R. S.* 148, 9, I am of opinion that the sections were inapplicable to that officer, and did not confer on him any authority. By § 1, "When any husband and wife shall live in a state of separation, without being divorced, and shall have any minor child of the marriage, the wife, if she be an inhabitant of this state, may apply to the supreme court for a habeas corpus to have such minor child brought before it. § 2. On the return to such writ, the court, on due consideration, may award the charge and custody of the child, so brought before it, to the mother, for such time, under such regulations and restrictions, and with such provisions and directions as the case may require." The supreme court alone—not a justice of that court, or a county judge—is invested with the authority given by those sections.

The 86th section of 2 *R. S.* 575, in regard to the application of the title relating to writs of habeas corpus, that "the several provisions contained in this title shall be construed to apply, so far as they may be applicable, and except when otherwise provided, to every writ of habeas corpus authorized to be issued by any statute of this state," does not extend the power specially granted to the supreme court by the above recited sections, to the county judge. There is nothing in the said title, in regard to the power to issue the writ, which may be applied to the case provided for by those sections, inasmuch as the sections give the power to the supreme court exclusively.

Under the provisions of the revised statutes, (2 *R. S.* 563, § 69,) authorizing the removal of the proceedings into this court by certiorari, the court has authority to examine and correct

any erroneous decision of the officer, upon a question of law. (*Morewood* v. *Hollister*, 2 *Selden*, 309.)

My conclusion is that the decision of the county judge should be reversed, and the proceedings before him dismissed.

[Cayuga General Term, June 1, 1857. *Johnson*, *T. R. Strong* and *Smith*, Justices.]

House *vs.* Burr and Spencer.

A lease was executed for a term commencing the 1st day of July, 1853, and ending the 1st day of July, 1855, "with the privilege of two years more, if desired," one month before the expiration of the period specified, at a certain yearly rent, to be paid monthly during the term, with a clause expressing that the lessees had hired and taken the premises "for the term and at the rent aforesaid," and that they agreed to pay the rent.

24 523
40b 437
49a 506

Held that it was not contemplated by the parties that in case the lessees should desire the premises for the additional two years, a new lease should be made, embracing the further time; but that it was intended the present lease, on notice being given, should cover the whole period. And that the agreement to pay rent was co-extensive with the entire term of the lease, not only as it was originally fixed, but as it should be extended according to the provisions of the lease.

And the lessees having, more than a month prior to the 1st of April, 1855, by writing on the back of the lease, assigned the same to other persons, after informing the lessor's agent that the assignees wanted the premises for the additional term, and obtaining his consent; it was *further held*, that this was a sufficient notice to effect the extension of the lease provided for.

Held also, that the lessees were liable for the rent for the month of April, 1855, notwithstanding their assignment of the lease; and that the consent of the lessor's agent to the assignment, did not discharge them from that liability.

Held further, that the transaction did not amount to a surrender of the lease, by the lessees, and the giving of a new lease to the assignees.

APPEAL from a judgment of the Monroe county court. The action was commenced before a justice of the peace, and was brought to recover rent claimed to be due upon a lease. The justice rendered a judgment in favor of the defendant

which was affirmed, on appeal to the county court. From the latter judgment the plaintiff appealed to this court.

A. Lathrop, for the appellant.

J. N. Pomeroy, for the respondents.

By the Court, T. R. STRONG, J. The lease in this case was for a term commencing the 1st day of July, 1853, and ending the 1st day of July, 1855, "with the privilege of two years more, if desired" one month before the expiration of the period specified, at a certain yearly rent, to be paid monthly during the term, with a clause expressing that the lessees, the defendants, had hired and taken the premises "for the term and at the rent aforesaid," and that they agreed to pay the rent. It is apparent from the phraseology employed, that it was not contemplated, in case the lessees should desire the premises for the additional two years, that a new lease should be made, embracing the further time, but that it was intended the present lease, on notice of such desire by the time prescribed being given, should cover the whole period. The term of this lease might, at the election of the lessees, and upon such notice, be extended two years. The agreement to pay rent was for the term, and was co-extensive with the entire term of the lease, not only as it was originally fixed, but as it should be extended according to the provisions of the lease.

The defendants, by writing on the back of the lease, assigned the same to other persons, after informing the agent of the plaintiff that the assignees wanted, and obtaining the consent of the agent to the assignees having, the premises for the additional time. This was more than a month prior to the 1st day of April, 1855; and this information from the defendants to the agent, with the consent given by him, was, without anything further, a sufficient notice to effect the extension of the lease provided for. The defendants could not have more clearly made known to the agent their desire for such extension.

than was done by telling him it was desired, and procuring his consent to it.

Upon this notice being given, and the lease being thereby extended two years, the lease became the same in legal effect as if the term, and the covenant to pay rent, had originally, in express words, embraced the two years, as well as the other portions of the time. It was a lease of the premises to the 1st day of April, 1857, inclusive, with an agreement by the lessee to pay the rent to that time.

There being, then, an express agreement by the defendants to pay the rent, they are liable upon it for the rent in question which is unpaid, being for the month of April, 1855, notwithstanding their assignment of the lease; unless they have in some way been discharged from the agreement. The consent of the plaintiff's agent to the assignment was not such a discharge. It was probably supposed to be necessary, and was obtained, on account of the provision against underletting. It was a simple permission, and did not impair or affect, in any way, the plaintiff's claim for rent on the express agreement. I see no ground for the position of the county court, that there was a surrender of the lease and a new lease executed to the assignees. The defendants sold their interest in the lease to their assignees; they did not relinquish it to the plaintiff; and the assignees claimed and held the premises subsequently as assignees, by virtue of the assignment; not under any new agreement. There was clearly no surrender in fact, as the lease was formally assigned, and the plaintiff consented to it; and there is no evidence to warrant the idea of a surrender in law. A surrender in law arises from acts of the parties inconsistent with the continuance of the lease, warranting the presumption of a surrender. The only circumstances in support of that view, beyond the assignment, consent thereto, and subsequent change of possession, which take place in every case of a valid assignment of a lease where an assignment is prohibited without consent, is the making out of a bill for part of a year's rent to the assignees, and receiving the amount from them. That is not necessarily inconsistent with regarding the lease in force,

and in the absence of other circumstances than exist in this case, is entitled to no force.

Upon the presumption of a surrender, there being no pretense of a written lease from the plaintiff to the assignees, the intentions of the parties in respect to securing to the assignees the premises for the extended term, would have failed of effect, as a verbal lease for more than one year is invalid.

I think the judgment of the justice and that of the county court, are erroneous, and should be reversed.

CAYUGA GENERAL TERM, June 1, 1857. *Johnson*, *T. R. Strong* and *Smith*, Justices.]

BOWMAN *vs.* EATON.

24 528
30 278
48h 450

Where the cause of action alleged in a complaint, is one accruing to the plaintiff by the unlawful conversion of property when he was the owner of it, and not one which accrued to a former owner of the property, by a conversion during his ownership, and which has been assigned to the plaintiff, the plaintiff cannot avail himself of a conversion by the defendant while another person was the owner, and before the sale of the property by him to the plaintiff.

A refusal to comply with a demand is only evidence of a conversion where an ability, at the time, to comply with it, is proved.

A demand of property after the sale thereof to the plaintiff by the former owner, and the disclaimer, by the person of whom the demand is made, of any knowledge of the property, and his omission to deliver it, it having been previously lost or stolen, and he not having possession thereof at the time, is not evidence of a conversion.

APPEAL from a judgment of the county court of Monroe county. The action was originally commenced before a justice of the peace. The plaintiff complained against the defendant, for the trover and conversion of a trunk or valise and its contents, consisting of a quantity of gold and silver watches and chains, various kinds of jewelry, clothing and other valuables, of the value of $100, the property of the plaintiff. The defendant denied the complaint and each and every allegation therein.

On the trial, the following facts appeared. In the month of September, 1855, Elias T. Wakefield, the plaintiff's assignor, on his way to Sackett's Harbor, got off the cars at Charlotte, about 8 o'clock in the evening, purposing to take the steam boat down Lake Ontario which was expected there the same night. He had with him some trunks, and also a valise containing, besides some clothing, 500 or $600 worth of watches and jewelry. The defendant kept a warehouse at the mouth of the Genesee river, for the storage of merchandise. The cars came up on one side of it, and the steam boats on the other. Passengers and baggage passed from the cars through the warehouse to the boats; and, to facilitate the transit, the defendant, for his own convenience, and that of passengers, put up inside his warehouse, two signs, to designate the places for the deposit of baggage, destined for the boats up and down the lake. The defendant had a number of hands employed about the storehouse, in various capacities. It was the business of one of them, Newcomb, to see to the baggage, as it passed from the cars to the steam boats. No one else had any thing to do with that business, except by his direction. Joshua Peet acted as porter under him. The defendant made no charge for the storage of baggage; but if a package was given in his special charge, and the person leaving it was disposed to give a quarter dollar, the witness, Newcomb, took it. On the evening in question, when his baggage came out of the cars, Wakefield asked some one whom he called the clerk, at the defendant's storehouse, what he, Wakefield, could do with it. The clerk inquired where he was going. He said to Sackett's Harbor, and showed him the baggage. The clerk called a man and told him to take care of it, and carry it in: and the man went to carry it in. It was put, with Wakefield's knowledge and assent, under the sign, labeled "Sackett's Harbor,' or "down baggage;" one of the storehouse-men telling him that was the place where they put the baggage for Sackett's Harbor. Soon after it was carried in, Wakefield, in passing to another part of the storehouse, saw the baggage in its place—the valise on top of the trunks. Or, according to Mattison,

another witness for the plaintiff, Wakefield, at the time claimed he had placed the valise with the rest of the baggage. Wakefield testified he thought Joshua Peet carried the things in. The valise was not put in Newcomb's charge, nor in that of any one authorized to receive it. Newcomb directed Peet not to carry Wakefield's things in. He carried the trunks in, notwithstanding, but saw no valise. Half an hour after seeing the valise on the trunks, Wakefield discovered it was missing. He applied to the man he calls the clerk, who called the man that carried it in, and inquired after it and looked around for it. Wakefield then informed him what the valise contained. The defendant, personally, did not see the valise and had nothing to do with it; nor had he known any thing about it, till after Wakefield claimed it was lost. He then came out of his office, and inquired of Wakefield if he had a valise, to whom he gave it, and who brought it in. Wakefield said he had one; that he had seen it on the trunks with the other baggage, but failed to point out the man to whom he gave it. The employees about the storehouse were all called up and questioned, but they denied any knowledge of it, except one, who thought he had seen such a valise on a trunk or box, but did not know what had become of it. The storehouse was searched, but it could not be found. Wakefield sold his claim to the plaintiff, about four months before the commencement of this suit, which was November, 27, 1855. After the summons was issued, and before serving it, the constable, Dow, assuming to act for the plaintiff, demanded the valise and contents of the defendant, who said he knew nothing about it.

The justice rendered judgment in favor of the plaintiff for $100 damages, besides costs, and the defendant appealed to the county court. That court affirmed the judgment of the justice, and the defendant appealed to this court.

Jerome Fuller, for the appellant.

Wm. H. Bowman, for the respondent.

By the Court, T. R. STRONG, J. The first count in the complaint states that the plaintiff was the owner, and entitled to the possession, of the property in question; that the property came into the possession of the defendant; and that he wrongfully converted it to his own use, and although often requested to do so, has neglected and refused to deliver the same to the plaintiff.

The second count states that one Wakefield was the owner of the property, and delivered it to the defendant, who received the same to be safely kept and cared for; that while the property was in the defendant's possession, it was sold and transferred to the plaintiff, of which the defendant had notice; and that afterwards, the defendant wrongfully disposed of and converted the same to his own use, and he neglected and refused to deliver the same to the plaintiff, although often requested.

The cause of action in each count, is one accruing to the plaintiff, by the unlawful conversion of the property when the plaintiff was the owner of it—not one which accrued to a former owner of the property, by a conversion during his ownership, and which has been assigned to the plaintiff.

On the trial, evidence was given on the part of the plaintiff tending to prove that Wakefield, when he owned the property, placed it in the possession and care of the defendant, and that about half an hour afterwards, on Wakefield calling upon the defendant for it, it could not be found, and was not therefore delivered to him; and that afterwards, Wakefield sold his claim against the defendant in respect to the property, to the plaintiff. And it was admitted by the defendant that when the constable went to serve the summons in this action, before serving it, he demanded the property of the defendant for the plaintiff, and the defendant said he knew nothing about it, and did not deliver it. On the part of the defendant, considerable evidence was given tending to disprove the receiving the property, and assuming the care of it, by the defendant.

Taking the facts to be according to the plaintiff's evidence, I am satisfied he is not entitled to recover. If there has been

any conversion of the property by the defendant, it took place while Wakefield was the owner of it, on the same day the defendant received it, and some time before the sale by Wakefield to the plaintiff. Of such a conversion, the plaintiff cannot avail himself under the complaint, not having alleged it, and the assignment of it to him. There is no evidence of a conversion subsequently. The demand of the property of the defendant, after the sale to the plaintiff, and the disclaimer of the defendant of any knowledge of, and his omission to deliver the property, it having been previously lost or stolen, and he not having possession of the property at the time, was not evidence of a conversion. A refusal to comply with a demand is only evidence of a conversion where an ability at the time to comply with it is proved. (*Hawkins* v. *Hoffman*, 6 *Hill*, 586.) There is no pretense, or ground for pretending, that the defendant, at the time of the demand, had possession of the property.

If there was no proof of the loss, or larceny, of the property, before the purchase by the plaintiff, the answer which the defendant made to the demand, connected with the fact that the property had been delivered to the defendant, might, perhaps, warrant the finding of a conversion. A denial of knowing any thing about it, with proof of the delivery to him, might warrant the inference of a present possession, and having the possession, a refusal to deliver would prove a conversion. (*Bush* v. *Miller*, 13 *Barb.* 481.) But the proof wholly repels such an inference, and disproves the possession of the property by the defendant at the time of the demand.

The judgment of the county court and that of the justice must be reversed.

[Cayuga General Term, June 1, 1857. *Johnson*, *T. R. Strong* and *Smith* Justices.]

SWEET & FAULKNER *vs.* BARNEY, president of the United States Express Company.

24 533
23a 335

Prima facie, a person receiving money is entitled to it, and does not become a debtor to the person delivering it. Some evidence in explanation of the transaction is necessary to establish a liability by the receipt of the money.

Hence, a bank in the city to which a package of money is sent by bankers in the country, by express, being considered the owner of the money, may authorize the same to be delivered at the office of the express company, or at any other place, in the city, to any person it may select; and the express company, on making such a delivery, will be discharged of their obligation in respect to the delivery; whether their obligation be that of common carriers, or of forwarders only.

The substance and spirit of what the persons sending the money, under such circumstances, exact, and the express company undertake, in regard to a delivery, is that there shall be such a delivery in the city as will charge the bank there with the receipt of the money, as between it and the persons sending it.

Where a package of money, thus sent, is directed to a bank in the city of New York, at its usual place of business, it is the duty of the express company—in the absence of any authority from the bank for a different mode of delivery—to deliver the package at the banking office, to the officer or clerk whose business it is to receive money for the bank.

And if it appears that it is the usual course of business of the express company to deliver money packages according to their address, it will be assumed that any particular package was delivered to, and received by, the company in reference to that practice, where there is no express contract in regard to the place of delivery, or the officer or person to whom the delivery shall be made.

In case of a package of money sent by country bankers to a bank in the city of New York, directed to it at its place of business, only a delivery at the office, to the proper officer of the bank, will be a delivery according to the address on the package, or which will charge the bank with the money.

But a delivery at the banking office, to the general receiving agent, being for the benefit of the bank alone, the bank may waive the same, and receive the money at a different place in the city, and by a different agent, and the express company be thereby discharged from liability.

The delivery of the money by the express company, at their office, to a person usually employed as a porter at the bank, being insufficient, unless it was authorized by the bank, it is incumbent on the company, for their defense, to prove such authority. This may be direct and express, or implied from the acts of the porter, such as receiving money for the bank, on other occasions, at the express office, sent to it in a similar way and with a similar address as that in question, with the knowledge and assent of the bank.

Sweet *v.* Barney.

APPEAL from a judgment entered at a special term, after a trial at the circuit. In November, 1854, the plaintiffs, being bankers in Livingston county, sent by the United States Express Company, of which the defendant was president, a sealed package of bank bills, directed on the cover, to "People's Bank, 173 Canal street, New York." The agent of the express company, on receiving the package in Livingston county, gave the following receipt:

"United States Express Company,
Office No. 82 Broadway, New York
Nov. 18, 1854.

S. Sweet & Co. has delivered to us one package money, marked as follows: People's Bank, 173 Canal street, N. Y., and said to contain twenty-eight hundred and ninety-two dollars, which we undertake to forward to New York, or to the nearest agency of this company only, perils of navigation excepted. And it is hereby expressly agreed that said United States Express Company are not to be held liable for any loss or damage, except as forwarders only; nor for any loss or damage of any box, package or thing, for over $150, unless the just and true value thereof is herein stated; nor for any loss or damage by fire; nor upon any property or thing unless properly packed and secured for transportation; nor upon frail fabrics, unless so marked upon the package containing the same; nor upon any fabrics consisting of or contained in glass.

For the proprietors, W. W. FINCH, Agt.

Contents unknown."

This action was brought to recover damages for the non-delivery of the package. The answer admitted the receipt of a package from S. Sweet & Co., directed to the "People's Bank, 173 Canal street, New York," on the day aforesaid, but denied any knowledge or information of its contents, and put in issue the residue of the complaint. The defense set up in the answer was, in substance, 1. That the defendants were not common carriers, but express forwarders; that their undertaking was evidenced by the receipt delivered by them at the time of receiving the package; that such paper created an obligation

only to transport to New York, which was done, but not to deliver the same at the bank, or to the officers thereof, and averred a delivery. The cause came on for trial at the Livingston circuit, before Mr. Justice JOHNSON, and a jury, on the 9th of October, 1855. The plaintiff proved the receipt of the package by the defendants; that it contained bank notes; that the plaintiffs had not received the package or the proceeds thereof. It was also proved that the express company forwarded the package to their office in New York. On its arrival, (on 20th November,) a person named Messenger, in the employ of the People's Bank, called for it, received it there, and gave a receipt for it in the book of the company. The book showed that he had thus received and receipted for the bank, *every* package directed to it, and carried by the company during that month; this being the tenth in number. It was further shown that this Messenger had received, for the six previous months, more than half of the packages intended for the bank; that this mode of delivery to him was adopted at the request of the officers of the bank; that it was for their accommodation, and not for that of the express company; that packages so delivered had been regularly credited by the bank, and no exception taken. This package thus delivered to Messenger, was stolen from him before he got to the banking house. The bank then, *for the first time*, disowned the agency of Messenger, and indemnified the plaintiffs.

The counsel for the defendants offered to show that John J. Messenger was in the habit of receiving from the defendants packages of money addressed to the bank, and did such other acts out of the bank; that a delivery to him at places other than at the bank was a good delivery to the bank. The counsel for the plaintiffs objected to any evidence of the acts of Messenger at places other than at the bank, or of a delivery to him at such places, by the defendants, of packages of money addressed to the bank as a delivery to the bank, unless they showed it was with the knowledge and authority of the bank. The court overruled the objection, and held that the defendants could show the nature and character of Messenger's employment and acts

for the bank outside the banking house, and could in this connection show the delivery by the defendants to Messenger at places other than at the banking house at No. 173 Canal street, at different times, of packages of money addressed to the People's Bank, 173 Canal street, and which afterwards came into the possession of the bank, and were treated by it as regularly received and delivered, and it would be a question of fact for the jury to determine on such evidence whether the same was with the knowledge and authority of the bank, and if so, it was a good delivery to the bank; to which rulings of his honor the judge the counsel for the plaintiffs excepted. The witness W. A. Countryman then testified, subject to the said exception of the plaintiffs' counsel, that he had met Messenger in Wall street and at different banks acting for the People's Bank in making exchanges and collections; had seen him carrying large packages of money, receiving and paying out the same; he usually carried the money in a little trunk; the packages when delivered at the bank were not always delivered to Mr. Mayhew, but were usually so delivered; some of the officers of the bank employed in the bank found fault that they got the packages too late for their exchanges, and told him that he might leave the packages at 92 Broadway, where the bank had an agency for the purpose of receiving deposits from down town dealers; that Thomas Sproull, a clerk of the bank, attended at this agency a part of the time; that he instructed the witness, who was in the employ of the express company as city messenger for the delivery of money and valuable packages, to give packages addressed to the People's Bank, to Messenger, whenever he should meet him.

At the close of the testimony, the counsel for the plaintiffs requested his honor the judge to charge the jury, 1. That the duty of the defendants was to deliver the package at the bank, as directed; and they were not authorized to deliver the same to any person, at any place, other than at the bank. 2. That neither the bank nor the defendants were authorized to change the mode of delivery of the packages, without the consent or the knowledge of Sweet & Co. And such change, if made without

their knowledge or consent, would not discharge the defendants 3. That there was not sufficient evidence submitted on the part of the defense to show an authority from the bank to Messenger to receive the packages from the defendants, so as to discharge them from their liability in this action. 4. That the evidence showed that Messenger, in receiving the packages at places other than at the bank, acted as the agent of the defendants. The judge refused so to charge, and the counsel for the plaintiffs excepted. The judge then charged the jury that the defendants were common carriers of the package of money in question, and liable as such for its safe carriage and delivery to the People's Bank, to which it was addressed. That they were bound to make such delivery as would make the consignees liable to the owner for the contents of the package. That such a delivery would be either at the banking house or office where the business of such bank was carried on, to some person in charge of the business; or to some person elsewhere in the city duly authorized by the proper officers of the bank to receive packages of this description. That such delivery in either case would discharge the defendants from their liability. That if the delivery was made at any place other than the bank, it was incumbent on the defendants to show that the person to whom it was delivered was authorized by the bank to receive it, and was its agent for that purpose. That a delivery to an agent of the bank duly authorized to receive packages of this description forwarded in this manner, would be delivery to the bank, and discharge the defendants. That the authority of Messenger, to whom the package in question was delivered by the defendants, to receive it for the bank, might be established by evidence of direct authority from the proper officers of the bank, or it might be inferred from evidence of repeated and continued acts of Messenger as agent, of the same character, with the knowledge and assent of such officers, and without any objection on the part of such officers, or notice to persons known to them to be thus dealing with him as such agent. That an authority from Sproull to deliver to Messenger was not sufficient, unless it appeared satisfactorily that such authority was at the instance or with the assent

and approbation of the officers aforesaid. That as there was no evidence of direct authority to Messenger, it was a question of fact for the jury to determine, from all the facts and circumstances, and the manner of transacting this kind of business, whether the officers of the bank knew that Messenger was holding himself out as their agent and professing to act as such; and whether, in fact, he had any authority from them thus to act, or was professing thus to act without direct authority, but with their knowledge and consent. That in either case, if they should find such to be the fact, the delivery was good, and the defendants discharged. The jury brought in a verdict for the defendants.

J. W. Gilbert, for the appellants.

O. Hastings, for the respondents.

By the Court, T. R. Strong, J. The plaintiffs were bankers at Dansville; and the People's Bank, to which the package of money was addressed, was the corresponding bank of the plaintiffs in the city of New York. The package was delivered to the defendants, as expressed in the receipt, "to forward to New York;" and the legal inference from this relation between the plaintiffs and the People's Bank, and the sending of the money, in the absence of other evidence on the subject, is that the money was sent as a payment, either upon a pre-existing debt to, or to purchase a credit at that bank, as a provision for drafts. *Prima facie* a person receiving money is entitled to it, and does not become a debtor to the person delivering it; some evidence in explanation of the transaction is necessary to establish a liability by the receipt of the money. (*Welch* v. *Seaborn*, 1 *Stark. R.* 474. *Bogert* v. *Morse*, 1 *Comst.* 377.) In that view the People's Bank, on the receipt of the money, would be the owners of it; and no good reason is perceived why the bank might not authorize a delivery of the money at the office of the defendants in New York to any person it might select; and the defendants on making such a delivery, be discharged of their

obligation in respect to the delivery; whether their obligation was that of common carriers, or, as stipulated in the receipt, "forwarders only." The substance and spirit of what the plaintiffs exacted, and the defendants undertook, in regard to a delivery, was that there should be such a delivery in New York as would charge the bank there with the receipt of the money as between it and the plaintiffs. The plaintiffs were only interested that there should be such a delivery; that the purpose of a payment or purchase of credit should be effected; beyond that the bank was solely interested, and might, with the defendants' consent, direct on the subject as it should think proper. It might with such consent direct the defendants to deliver to any person, at any store or place in the city, other than its principal office or place of business, having regard to its own interests, or convenience, or even the convenience of the defendants.

Independent of authority from the People's Bank for a different mode of delivery, it was doubtless necessary in this case to deliver the money at the banking office, to the officer or clerk whose business it was to receive money for the bank. The course of business of the defendants was to deliver money packages for that city according to their address, and it must be assumed that the one in question was delivered to, and received by, the defendants in reference to that practice, there being no express contract in regard to the place of delivery, or the officer or person to whom the delivery should be made. The legal duty of the defendants was therefore to deliver according to their usual course of business; and so far as there was any implied contract it arose out of, and corresponded with, this legal obligation. Only a delivery at the office, to the proper officer of the bank, would be a delivery according to the address on the package, or which would charge the bank with the money. But, as already stated, I think the bank might receive the money at a different place in the city, and by a different agent, and the defendants be thereby discharged from liability. A delivery at the banking office, to the general receiving agent, was for the benefit of the bank alone, which the bank might waive, and substitute another place and agent. Any mode of delivery in New York, consist-

ent with the object and intent of the plaintiffs in sending the money, assented to by the bank, would discharge the duty of the defendants as to a delivery of the money.

The delivery of the money by the defendants at their office in New York, to a person usually employed as a porter of the People's Bank, being insufficient unless it was authorized by the bank, it was incumbent on the defendants for their defense to prove such authority. The authority might be direct and express, or implied from the acts of the person who received the money, such as receiving money for the bank, on other occasions, at the defendants' office, sent to it in a similar way and with a similar address as that in question, acquiesced in by the bank. (*Conover* v. *Mut. Ins. Co.* 1 *Comst.* 290. *Story on Ag.* §§ 54 *to* 56, 84 *to* 123.) In the present case, the defendants relied, in support of such authority, upon presumptive evidence, consisting of a series of similar acts by the alleged agent, without, so far as appears, any objection, or even inquiries by the bank at any time, where the money was received. Looking at the charge to the jury in connection with the questions of evidence raised, I think the plaintiffs have no substantial ground for complaint as to the reception of evidence, on that subject; and I am satisfied there was sufficient evidence of such acts as above referred to, and the knowledge of, and acquiescence therein, by the bank, to call for the submission of the question of agency to the jury. As to such knowledge by the bank, it must have been possessed by it, unless its officers were guilty of the grossest negligence in omitting to inquire how the money was received; and if they knew it was delivered at the defendants' office for them, they must, in the absence of evidence that they objected, be deemed to have assented to the practice of the defendants to make such a delivery.

I see no error in the charge or refusals to charge, and am of opinion the judgment should be affirmed.

[Cayuga General Term, June 1, 1857. *Johnson*, *T. R. Strong* and *Smith*, Justices.]

SWIFT *vs.* KINGSLEY and others.

Although, under the code, the allegations of the complaint, not specifically denied are to be regarded as admitted, yet where there are several answers, an admission made in one is not available against the others. Each answer must stand by itself as a complete defense, and the plaintiff must recover upon the whole record.

An implied admission, in one of several answers, therefore, will not conclude the defendant, or estop him from showing the matters of defense set up in another answer.

The statute (*Laws of* 1850, *ch.* 278) requiring a contractor with the state for the performance of work upon the canals to execute a bond conditioned that he will pay all *laborers* employed by him, and the general rail road act, containing a similar provision, in respect to laborers employed in the construction of rail roads, were designed to secure the payment of the *actual laborers*; those who do the work on canals and rail roads. They were not intended to include contractors or jobbers, or sub-contractors of portions of the work.

Accordingly *held* that a sub-contractor, in respect to a portion of the work contracted to be performed by another, upon a canal, could not maintain an action upon the bond given by the contractor, to the state, in pursuance of the statute, to recover a balance remaining due to him from the contractor.

APPEAL from a judgment entered at a special term, upon the report of a referee. The complaint charged that on the 27th December, 1854, the defendant Kingsley entered into a contract with the state of New York, to construct all the culverts on sections 285 to 298 inclusive, on the Erie canal enlargement. That on the 8th of January, 1855, the defendants executed a bond to the said state, in pursuance of the provisions of an act passed April 10th, 1850, entitled "an act to secure the payment of wages to laborers employed on the canals and other public works of this state;" and which is set out at large in the complaint. Which bond was duly filed in the office of the clerk of Monroe county. That the plaintiff, at the request of the defendant Kingsley, excavated on section 294, of earth, 3095 yards, at the agreed price of 20 cents per yard, and 1182 yards of rock at 75 cents per yard, amounting in the aggregate to $1506.03. That the plaintiff also labored for said Kingsley in and about said canal work, 60 days, at one dollar per day. That said work and labor was completed on the 5th of May, 1856, and that for the cause aforesaid the defendants were indebted to the plaintiff for a balance of $426.11. The defend

ants answered, 1. That on the 14th of January, 1856, the plaintiff entered into a contract with the defendant Kingsley to dig two culvert pits on sections 294 and 295, at the rate of 20 cents per cubic yard for earth, 30 cents per cubic yard for loose rock, and 75 cents per cubic yard for solid rock excavations, to be paid monthly, according to the engineers' estimate; and that the work alleged in the complaint was done under such contract as a sub-contractor on said canal, and not as the laborer or servant of said Kingsley. 2. That in pursuance of such contract, the plaintiff excavated 1500 yards of earth, 550 yards of loose rock, and 550 of solid rock, at the prices aforesaid, which was the same work stated in the complaint, and denied that the plaintiff performed any greater or other amount of work than above stated, or that he performed the day labor or any part thereof; and they averred that it was a part of said contract that Kingsley might reserve from such price the wages of the laborers, employed on the same, and that he has fully paid said laborers, and denied that there was any thing due the plaintiff, but alleged that he had been fully paid. 3. That by the said contract the plaintiff was to complete his work by the 1st of April, 1856; and averred performance on the part of Kingsley; but alleged that the plaintiff had not completed the work; that a large amount thereof remains unfinished, and that the plaintiff had refused to complete the same, to the damage of the defendant Kingsley, &c. The cause was referred by order of the court to Ebenezer Griffin, Esq. The counsel for the plaintiff claimed before the said reference, that the cause of action and work done, specified in the complaint, was admitted by the first answer of the defendants; and that in that stage of the cause, as the defendants held the affirmative, under the second and third answers, no proof was necessary on his part. The counsel for the defendants moved that the plaintiff be nonsuited, upon the ground that on the pleadings in this action the plaintiff's claim was not admitted. And upon the further ground, that the plaintiff was not entitled to recover without proof. But the referee decided that the claim of the plaintiff was admitted by the pleadings, and that

no proof was necessary to entitle him to recover; to which decision the counsel for the defendants excepted.

The defendants offered to prove, under the second defense in their answer, that 1887.53 yards of earth excavation and 881.13 yards of rock excavation on section 294, was done by the plaintiff under his contract, and that that was all the labor performed by the plaintiff on that section. The plaintiff thereupon admitted that amount of work was done, but objected to the defendants' right to prove that no more work was done, for the reason that they were estopped by the pleadings from so doing. The referee sustained the objection, and decided that the defendants could not prove any thing about work different from the amount of work admitted by the first defense, and as stated in the complaint, and excluded the evidence. To which decision the defendants also excepted.

The referee reported that the defendants were indebted to the plaintiff in the sum of $335.99, besides costs.

Lansing & Backus, for the appellants.

H. K. Jerome, for the respondent.

By the Court, E. Darwin Smith, J. This case was obviously tried upon a mistaken theory. There being no general denial of the allegations of the complaint, it was held that the plaintiff was not, under the pleadings, bound to make any proof, and that he could recover upon the implied admissions made in one of several answers. The allegations of the complaint not specifically denied are, it is true, to be regarded as admitted. (*Code*, § 168.) But where there are several answers, an admission made in one is not available against the others. Each answer must stand by itself as a distinct defense, and the plaintiff must recover upon the whole record. One issue found for the defendant, if a material one, is as complete a defense for him as if all the issues were found in his favor. The first answer in this case sets up a special contract, and states that the work alleged to have been performed by the plaintiff was done by the

plaintiff under such contract, and as a sub-contractor of the defendant Kingsley, and not as his servant or agent. The issue presented upon this answer is simply that the work mentioned in the complaint was performed by the plaintiff under a *special contract* as a *sub-contractor*. It impliedly admitted the work mentioned in the complaint, and denying none of its allegations must be held to admit them. The referee decided correctly, so far as relates to this answer. If it were the only answer in the action the plaintiff might rest at once on the pleadings, and leave the defendant to prove the special contract. But this did not entitle the plaintiff, upon the basis of this implied admission, to recover upon the whole record. The admission in this answer is not an admission of a fact in the cause, but is simply an admission for the purpose of that particular answer, and must be limited in its operation and effect to that answer.

The second answer sets up the special contract, and admits distinctly a specified amount of work done under it, and denies that any more work was done, and sets up payment for the work and that nothing is due the plaintiff. The burden of proof to show the special contract, and payment, under this answer, was upon the defendant. If the plaintiff was entitled to recover upon the admissions in the pleadings, I think he was not entitled to recover for any more work than is distinctly admitted in this answer, for it contains an explicit denial that any more work was done. If the plaintiff was not satisfied to recover for the amount of work herein specifically admitted, I think he was bound in the first instance to give proof of the work, to recover for more than such amount. The referee therefore erred in treating the implied admission in the first answer as an admission upon the whole record entitling the plaintiff to recover for the whole work claimed in his complaint, without any proof. And if this be not so, the referee clearly erred in refusing to permit the defendant, under the issue presented in the second answer, to prove the actual amount of the work done, and to show that no more work was done than was admitted in such answer. It was a mistake to hold that the admission implied in the first

answer *estopped* the defendant from proving under another issue the true amount of the work.

The amount of damages which the referee has reported in favor of the plaintiff was therefore made up upon an erroneous assumption that the admission in the first answer was conclusive and estopped the defendant from showing the real facts. But it appears from the proof and the referee's report, taken together, that the defendant did fully sustain the issue of fact tendered upon the first answer.

The referee however finds, as matter of law, that the plaintiff is entitled to recover. This finding assumes that the fact stated in this answer, that the plaintiff was a sub-contractor and performed the work as such under a special contract, was not in law a valid defense in the action. This seems to be the real point of the defense, and one which the court will necessarily have to meet again if we send the case back for a new trial without deciding it now. In the case of *McCluskey* v. *Cromwell*, (1 *Kernan*, 593,) the court of appeals held that a bond given to a contractor upon the state works, under the act under which the bond set up in the complaint in this action was given, (*Laws of* 1850, *ch.* 278,) was not an available security for the payment of laborers employed in constructing the work by a person to whom it was sub-let by such contractor: *a fortiori* it cannot be an available security for such sub-contractor himself. This statute and the general rail road law containing a similar provision in respect to laborers employed in the construction of rail roads were passed by the same legislature, and were doubtless designed for the same object, to secure the payment of the *actual laborers*: those who do the work on canals and rail roads; those who in fact use the shovel, the pickax and the wheelbarrow, and carry the hod. They were never designed for contractors or jobbers or sub-contractors of portions of the work. This class of men can take care of themselves, ordinarily. But the legislature knew well that the actual operatives in most cases were poor men who depend upon their daily labor for a livelihood, and were therefore greatly exposed to suffer from the injustice, oppression and bankruptcy of contractors. These statutes were

passed for the protection specially of this class of men, and cannot be extended to embrace any others. In *Warner* v. *Hudson River R. R. Co.*, (5 *How.* 454,) it was held that a man who performed work with his team was *a laborer*, within the terms of the act, and all *others* who by themselves or by their servants actually performed the work, in contradistinction from those who employ the laborers. The plaintiff here was a sub-contractor under the defendant Kingsley and of a part of his job. His claim is for work done under a special contract in which he agrees to employ as large a force of men as can work to advantage. He is himself an employer of men in large numbers. He is not in any sense a *laborer*, within the sense and meaning of the statute.

The judgment should be reversed, and a new trial granted; costs to abide event.

[Cayuga General Term, June 1, 1857. *Johnson*, *T. R. Strong* and *Smith*, Justices.]

24 546
14h 420
23h 417

Holmes *vs.* Weed.

If a surety knows that a claim made by a creditor of his principal is just, he has no right to interpose a defense to a suit brought against him as surety, and litigate the same. If he does so, and fails in the suit, he cannot recover of his principal the costs paid by him. He is only entitled to recover the costs of a judgment by default.

Appeal by the defendant from a judgment entered at a special term, upon the report of a referee, after a new trial had been granted. *See S. C.* 19 *Barb.* 128, where the facts are fully stated. On the second trial, the referee reported in favor of the plaintiff for $780.60 damages, and $227.07 costs.

James Wood, jun., for the plaintiff.

R. P. Wisner, for the defendant.

By the Court, E. DARWIN SMITH, J. All the questions presented upon this appeal were disposed of when this case was before the court on the former occasion, (*see* 19 *Barb.* 128,) except the question of damages. The court then held that the plaintiff was entitled to recover the amount of the judgments of the Walkers and Hovey, paid by the plaintiff. But the question whether he was entitled to recover the costs of the plaintiffs, included in said judgments paid by him, was not then raised, and was not passed upon by the court. The court held that the assignment of the contract for carrying the mail by the plaintiff to the defendant, in connection with the agreement of the defendant to pay the Walkers and Hovey for their services after such assignment, operated to make the defendant the principal in the business and the plaintiff his surety to them. Such being the relation of the parties to each other, the plaintiff is entitled to all the rights growing out of that relation. In *Elwood* v. *Deifendorf*, (5 *Barb.* 412,) it was held "that one of the rights of a surety is to charge his principal with the costs of a suit for the collection of the debt, which he has been compelled to pay." The case of *Baker* v. *Martin*, (3 *Barb. S. C. R.* 634,) is referred to as authority for the decision. In the case of *Baker* v. *Martin*, it is said that a person who makes or indorses an accommodation note is regarded as a surety, and can charge his principal with the costs of a suit for the collection of the note, which he may be compelled to pay, and 16 *John.* 70; 15 *id.* 273, and several other cases are cited. No question was made in either of the above cases as to the amount of costs, and it did not appear in either suit, that the actions had been defended by the surety. These cases, upon the facts, were rightly decided, on the assumption that no defense was interposed by the surety, and the costs recovered were the mere ordinary costs of a suit not litigated. I think they imply nothing more. But in this case it appears that the surety litigated the suits, and being unsuccessful in the litigation, now seeks to charge his principal with the costs of the defense thus incurred by him. It distinctly appears that the principal had no notice of the commencement or pendency

of the suits, nor assented in any way to the defense. The costs unnecessarily made by the plaintiff in such litigation, I think, are not recoverable. In *Short* v. *Galloway*, (11 *Adol. & Ellis*, 23,) Lord Denman, in a case where the surety had made a defense to a suit against him, said: "No person has a right to inflame his own account against another, by incurring additional expense in the unrighteous resistance to an action which he cannot defend." That is the precise case here. The plaintiff was the primary debtor to the Walkers and Hovey. They did the work for which their respective actions were brought, upon an express contract with the plaintiff, and had no one else to look to for their pay. The plaintiff knew that the claim of payment for carrying the mail on a contract thus made with him, was a just one, and their right of action against him clear and unquestionable. He had no right, therefore, to interpose a defense and litigate their claims, and then seek to recover the costs paid in these suits, of the defendants. It is a sound and just rule, that a surety cannot recover his costs if he puts the party to a useless expense by defending an action which he ought not to have defended. (*Burge on Suretyship*, 363. 7 *Bing*. 246. *Mood. & M*. 487. 5 *Esp*. 171.) Clearly this rule should be applied to the present case. In the suit of Artemas B. Walker against the plaintiff and Wadmans, it appears that the damages recovered were $67.85, and the costs $111.52. In the suit of Thomas B. Walker, the recovery was for $89.85 damages, and $74.31 costs; and in the suit of Hovey the recovery was for $89.38 damages and $23.51 costs. The plaintiff should only be allowed the costs of a judgment by default in each of said actions, and there should be a new trial, unless the plaintiff stipulates to remit from the amount of the judgment recovered, the sum of $164.35, estimated to be the amount of costs included in said judgment, not recoverable in said action. If so, judgment affirmed; otherwise reversed, and new trial, costs to abide the event.

[Cayuga General Term, June 1, 1857. *Johnson, T. R. Strong* and *Smith*, Justices.]

SIDNEY SWEET *vs.* BENJAMIN BRADLEY and others.

21 549
44 538
52 360

To sustain an action upon a warranty, it is not necessary that all the representations made by the defendant should be false, or all actionable. If any part of the representations are actionable, it will suffice.

Where a partner, upon selling promissory notes belonging to the firm, and for their benefit, stated to the purchaser that he would warrant them to be good notes, and they would be paid; that they were given for a valuable consideration, and were regular business paper; that the makers were responsible, and worth $40,000 or $50,000, and the indorser worth $25,000; which representations were false, and the makers insolvent; *Held* that the firm was bound by the representations made by the partner on selling the notes; and that an action would lie against all the members of the firm, upon the warranty.

A positive affirmation of a fact is a sufficient warranty.

An affirmation in regard to an existing fact, distinctly and positively made, in negotiations for trade, should be regarded as a contract, and enforced as a warranty.

In an action brought upon a warranty, by an assignee, the measure of damages is the sum which the assignor might have recovered, had the action been brought in his name. The amount paid by the assignee, for the right of action, is not the rule. The warrantor must make good his warranty.

THIS action was brought upon a warranty, alleged to have been made by the defendant B. Bradley, upon a sale of notes belonging to him and the other defendants, Pettibone and Woodruff, composing the partnership firm of B. Bradley & Co., to one Simon Gallinger. The cause of action had been assigned by Gallinger to the plaintiff. On the trial, Gallinger was examined as a witness for the plaintiff, and proved the material facts alleged in the complaint. The defendants moved for a nonsuit, on the following grounds: 1st. That the plaintiff had not made out any cause of action. 2d. That the demand, or alleged cause of action, was not assignable so as to enable the plaintiff to maintain the action in his own name. 3d. That Woodruff and Pettibone were not bound by any agreement of Bradley on the sale of the notes, as not being within the business of the copartnership. 4th. That Woodruff and Pettibone were not bound by any act of Bradley, the same not being within the business of said copartnership; which motion was denied, and the defendants excepted.

The parties having rested, the defendants asked the court

to charge the jury, in addition to the grounds of nonsuit, 1st. That there could be no recovery against all the defendants except as copartners. 2d. That as copartners there could be no recovery against all of the firm, unless the transaction was within the copartnership business. 3d. That no damage had been shown by the plaintiff. 4th. That at the time of the transfer of the notes by Gallinger, no damages had been sustained by him. 5th. That if Gallinger had sustained any damages, the $1200 received by him must be deducted. 6th. That the assignee could only recover the damages which Gallinger had sustained. The court declined so to charge, and thereupon charged the jury, 1st. That if at the time the notes were sold and transferred to Gallinger, they were owned by the defendants as partners, and were transferred by the defendant B. Bradley, with a warranty that the makers were worth forty or fifty thousand dollars, and the indorser worth $25,000, and that such warranty was part of the agreement of sale, and the makers and indorsers were in fact insolvent at the time, the cause of action was made out; that such a warranty by B. Bradley would be binding upon his partners on the transfer of such notes. The defendants' counsel excepted to so much of the above charge as instructed the jury that B. Bradley's warranty would be binding on the other defendants. The court further charged, that if these notes were made and indorsed by Faulkner for the purpose of having them discounted, to raise money to pay other notes on which he was contingently liable, and they were taken and sold for $1800 before they had been thus discounted, the indorser could set up the defense of usury, and would not be liable, if he insisted on that defense. The court also charged, that if they found there was such a warranty, and that both the makers and indorsers were insolvent, the plaintiff was entitled to recover the full amount of the notes; or if they found there was such warranty, and the makers were insolvent and the indorser not, but that he was not liable as above, that then the plaintiff was entitled to recover the full amount. To each of which several charges, and to the refusal of the court to charge as requested, the de-

fendants excepted. The cause was then submitted to the jury, and the jury found a verdict in favor of the plaintiff, and against all of the defendants, for the sum of $2294.51, the amount of the said notes and interest.

The defendants, upon exceptions taken at the trial, moved for a new trial.

L. C. Peck, for the plaintiff.

J. L. Curtenius, for the defendants.

By the Court, E. Darwin Smith, J. The verdict in this case is eminently just, and it is the duty of the court to sustain it if possible, consistently with the rules of law. The defendants having accepted and paid, as accommodation acceptors, a draft drawn upon them by J. and L. Bradley, and indorsed by Faulkner, for $2000, made to take up protested paper of the said J. and L. Bradley indorsed by said Faulkner, received these two $1000 notes from the Bradleys, with one other of $1000 to replace them in funds for such advance. These three notes were sent in pursuance of a request by Benjamin Bradley for that purpose, and were credited to J. and L. Bradley, by B. Bradley & Co. The notes thus became the property of B. Bradley & Co. As such, the two notes in question, of $1000 each, were sold by B. Bradley to Gallinger, who paid for them in a note of B. Bradley & Co. for $1100 held by him, due in a few days after the sale, and in a draft on New York for $700, delivered to B. Bradley at the same time. It thus appears that the notes sold to Gallinger were the property of the defendants, and were sold for their benefit, and they received the proceeds therefor. The defendants were therefore clearly liable as partners, upon any contract made by Benjamin Bradley on the sale of these notes; and the rulings of the circuit judge, and his charge on this point, were clearly correct. The notes were sold to Gallinger by B. Bradley, upon a very clear and explicit engagement on his part to warrant or guarantee the payment thereof by the makers. Bradley's representations to

Gallinger, in respect to the goodness of the makers and indorsers of the notes, were very positive, and it is quite obvious that the sale was made in reliance, in part, upon the faith of such representations, and the repeated assurances of B. Bradley that the makers and indorsers were good, and the notes would be paid, and that he would warrant their payment. If the action had been for deceit in the sale of these notes, the representations shown to be untrue in respect to the circumstances both of the makers and indorsers of the notes, connected with the fact that their paper had been previously protested, and that B. Bradley & Co. as accommodation acceptors, had been obliged to pay a draft made by them of $2600, itself given to take up protested paper, with the other facts and circumstances in the case, would probably have authorized the jury to find for the plaintiff, on such an issue. But the action is in form one of contract, and the chief question in the cause is, whether, as such, it can be maintained. In the negotiations which preceded the exchange of the papers and the final consummation of the trade, Gallinger continually required the indorsement of B. Bradley & Co. on the paper, and Bradley as persistently refused to give such indorsement; but reiterated and insisted that the notes were good, and that he would be perfectly willing to indorse them, except that the restrictions of his partnership obligations forbade his doing so; saying, at the same time, "I will warrant them to be paid; I will see it paid, you may take my word; my word is as good as any writing." So far as this language and these undertakings are concerned, they are promises to answer for the debt, default or miscarriage of another person, and being by parol are clearly within the statute, and void. But the case turned at the circuit upon the other branch of the representations made at the time, and it remains to inquire whether the charge of the circuit judge was right upon this point. The charge on this point is as follows: "That if at the time the notes were sold and transferred to Gallinger, they were transferred by the defendant B. Bradley, with a warranty that the makers were worth $40,000 or $50,000, and the indorser worth $25,000, and

that such warranty was part of the agreement of sale, and the makers and indorsers were in fact insolvent at the time, the cause of action was made out." The jury, in finding for the plaintiff, have affirmed this proposition, and the proofs clearly warrant the finding, upon the facts. At the time of the trade, Bradley, in the final conversation, said of the notes: "I will warrant them good notes and they will be paid; they were given for a valuable consideration, and are regular business notes; the makers are responsible; J. and L. Bradley are worth $40,000 or $50,000, and R. L. Faulkner $25,000; all you have got to do is to present these notes when they are due."

The argument of the defendants' counsel is, that this was all one transaction; that the contract or engagement of B. Bradley is an entire one and is a guaranty of the goodness of the notes, and in effect an engagement to pay the same if the makers or indorsers did not, and is thus a promise to pay the debt of another, and within the statute. I do not think we are bound to put such a construction upon these declarations, to save the defendants from a just and honest responsibility. The representations are *positive* as they were *false* in fact. A positive affirmation of a fact is a sufficient warranty. It is not necessary, to sustain an action for deceit for false representations, that all the representations made at the time should be false. So it is not necessary, when the action is for a warranty founded on the representations, that all the representations should be false, or all actionable. If there be any actionable representation it will do. It is precisely as though but part of the actionable words alleged in an action for slander were proved. The fact that Bradley made promises or representations which will not sustain an action, ought not to vitiate in respect to those that will. Those which will sustain an action, if proved, are not to be affected by the rest of the conversation had, or declarations made, at the time, unless they qualify the representations relied on, or destroy their force. Gallinger had a right to rely upon the representations of Bradley in regard to the responsibility of the makers and indorsers of the note, and he doubtless purchased the notes trusting to the responsibility of

the makers and indorsers to pay the same, in confidence that B. Bradley knew and truly stated the facts in regard to their pecuniary ability, respectively. Such representations cannot be treated as mere matters of opinion, and the jury have found otherwise, in this case. What a man *positively affirms*, with the view to induce another to part with his property, if relied on and confided in, he should be held to undertake and promise to be true. An affirmation in regard to an existing fact, distinctly and positively made in the negotiations for trade, should be regarded as a contract, and enforced as a warranty. (2 *Cowen*, 438. 4 *id.* 440. 10 *Wend.* 41. 6 *Barb.* 537.) The charge, in this particular, was right, and in all particulars. The correct rule of damages was given to the jury. The defendants were merely required to make good their warranty. The consideration for which Gallinger sold the right of action to the plaintiff, had nothing to do with the question of damages. The plaintiff had purchased the entire right of action, and was entitled to recover the full damages which Gallinger might have recovered if the suit had been brought in his name.

The sale to the plaintiff did not in any way affect the measure of damages for which the defendants were liable. The judgment should be affirmed.

New trial denied, with costs.

[Cayuga General Term, June 1, 1857. *Johnson, T. R. Strong* and *Smith*, Justices.]

Farrington *vs.* The Frankfort Bank.

Where negotiable paper, obtained from the party executing it by means of fraud, is parted with to an innocent holder, in the usual course of trade, for a valuable consideration, such holder will be protected.

But the valuable consideration must be either a new advance, made at the time; or some prior security must be parted with; or an existing indebtedness actually discharged, in order to complete the title of the holder.

Where the plaintiff was induced, by the false and fraudulent representations of the drawer of bills of exchange, to indorse the same for his accommodation

24 555
31 183
37 466
43 392
41 72
6n 348
7n 280
40n 325
49n 11
36a 130
49a 294
65a 441

and the bills were thereupon delivered to the cashier of a bank which then held protested drafts drawn by the same drawer upon the same drawees; there being no agreement between the drawer and the cashier that the new drafts should be received by the bank in *payment* of the protested drafts, but the same were procured by the drawer and delivered to the cashier with the intention that they should be held as additional and collateral security to the protested bills; and the new drafts were subsequently passed to the credit of the drawer, on the books of the bank, and he was charged with the protested bills, and the latter were stamped with the canceling iron of the bank, but still remained in its possession; *it was held* that the plaintiff's indorsement, having been obtained by fraud and misrepresentation, was to be deemed void as against him; and that the bank was not entitled to protection as a *bona fide holder* for a valuable consideration and without notice.

Held also, that the plaintiff might maintain an action against the bank to have the indorsements declared void in its hands, to restrain the collection of the bills, and to have the indorsements erased therefrom.

APPEAL from a judgment entered at a special term, after a trial at the circuit. The complaint alleged that the firm of Osborn, Turnbull & McDonald, a produce firm in New York, was insolvent on the 17th January, 1856, and that the cashier of the defendant knew that fact; that on the 14th of January, drafts on the firm, accepted by them, and on which the defendant had advanced money, came back protested for non-payment, and remained unpaid, which was also known to the defendant's cashier, but all these facts were unknown to the plaintiff. That on the 17th January, 1856, Simeon Osborn, jun. a member of said firm, and Mr. Pomeroy, the defendant's cashier, came to the dwelling of the plaintiff, and Osborn requested the plaintiff to indorse two drafts, drawn by Osborn on the firm—one for $2000 and one for $2500—and to induce him to do so, made certain representations in reference to the solvency, &c. of the firm and of Osborn individually, relying on which the plaintiff indorsed the drafts in question, and they were delivered by Osborn to the defendant. That the defendant parted with no value or securities for the draft; that the indorsement was for the accommodation of Osborn and the firm, and without consideration; and that Osborn came at Pomeroy's solicitation, Pomeroy knowing that the firm was insolvent. That Osborn's representations were false, and the firm had then failed and made an assignment

and Osborn's individual property was covered by mortgages and judgments. Judgment was prayed, declaring the drafts void in the defendant's hands, and a preliminary injunction restraining their negotiation, &c. The answer alleged that the firm's acceptances had been protested before, without impairing their credit or solvency; and that on the 9th of January, 1856, a draft for $2000, and on the 15th of January, 1856, another draft for $2500, accepted by the firm, and which had been discounted by the defendant, were returned protested for non-payment. It also denied all complicity (or knowledge on the part of the bank or Pomeroy, of any of the facts tending to establish any complicity) on the part of the bank or Pomeroy, in the alleged misrepresentations of Osborn &c., or any guilty knowledge &c., and put in issue the plaintiff's ignorance and Osborn's knowledge of the condition of the firm, &c. It then alleged that the cashier had no knowledge or suspicion that Osborn was about to make or did make any true or false representations, and put in issue the fact of the representations having been made. It also alleged that on the 17th of January, before the drafts in question were made or indorsed, Osborn and the cashier had made an agreement that Osborn should furnish to the bank such drafts as he did furnish, indorsed by the plaintiff, and that such drafts should cancel and pay the two protested drafts above mentioned; that Osborn furnished the drafts pursuant to the agreement, and on receipt of them the bank canceled the old drafts, and received the new drafts in full payment thereof, and so parted with securities &c., by releasing Turnbull and McDonald, two of the acceptors of the protested drafts. It alleged, on information and belief, that there was a full consideration for the indorsement, moving from Osborn to the plaintiff, and put in issue the material facts touching the insolvency &c. of Osborn and the firm. The cause was tried at an adjourned circuit, in Herkimer county, in May, 1856, before Justice PRATT, without a jury.

The following facts were found by the judge: Previous to January 17, 1856, the firm of Osborn, Turnbull & McDonald had been engaged in business in the city of New York, in the purchase and sale of butter and cheese; and in such business had,

from time to time, obtained money from the defendants upon drafts drawn by Simeon Osborn, jun. a member of the firm, who resided in Herkimer county, upon the firm in New York, and which drafts were accepted by the firm. On the 17th of January, 1856, the said firm were indebted to the defendants upon such drafts, in about the sum of $17.500, none of which were due except two drafts, amounting in the aggregate to $1400, which had been protested for non-payment; one on the 9th and the other on the 15th day of January. On the said 17th day of January, Mr. Pomeroy, the cashier of the defendants, hearing that the firm was in a very precarious condition, called upon the said Simeon Osborn, jun. and pressed him for further security, and for that purpose went with him to the house of the plaintiff, to solicit him to become indorser for said firm. Osborn, in a private interview with the plaintiff, solicited him to indorse for them to the amount of $4500, and to induce him to do so, represented that they were under temporary embarrassments merely; that there would be no risk in indorsing; that the firm, as well as himself, individually, had ample means to secure him if the firm should become more embarrassed. Induced by these representations, the plaintiff indorsed, in blank, the two drafts in question, drawn by the said Simeon Osborn for $4500, which were delivered to the said cashier. The representations made by said Simeon Osborn to the plaintiff were untrue in fact; the said firm at that time having actually suspended, and being at the time largely insolvent, and the firm and the said Simeon Osborn individually having assigned and otherwise encumbered all their property for the benefit of other creditors of the firm. The cashier had no actual knowledge of the misrepresentations of Osborn to the plaintiff. There was no agreement between Osborn and Pomeroy, that the said drafts should be received by the bank in payment of the drafts then under protest, but the same were procured by Osborn and delivered to Pomeroy with the intention, on the part of Osborn, that they should be held as additional and collateral security to the indebtedness then existing against said firm in favor of the defendants. Pomeroy, on the 19th of January, and before the service of the injunction in

this cause, passed the drafts in suit to the credit of Osborn upon the books of the bank, and charged him with the protested drafts, and stamped them with the canceling iron, which drafts have since remained and are now in possession of the defendants. Upon these facts the judge found as matter of law, that the drafts not having been delivered to the defendants upon any new consideration or credit, nor in payment of any antecedent indebtedness; and the indorsement of the plaintiff having been obtained by misrepresentations, the same should be deemed void, as against the plaintiff, in the hands of the defendants. The plaintiff was therefore declared entitled to the relief prayed for in the complaint, without costs to either party. A judgment was accordingly entered, by which it was adjudged, declared and determined, that the said indorsements by the plaintiff were null and void as against the plaintiff; and the defendant, its officers and agents, were perpetually enjoined from enforcing the collection of said drafts, or either of them, by suit or otherwise, against the plaintiff; and from bringing any action at law or equity against the plaintiff upon the said drafts, or either of them; and the plaintiff was adjudged and declared to be freed and discharged of and from any liability on account of said indorsements. And it was further ordered, adjudged and determined, that the defendant be ordered and directed to erase the plaintiff's indorsements upon said drafts.

From this judgment the defendant appealed.

R. Conkling, for the appellant.

F. Kernan, for the respondent.

W. F. Allen, J. The bills in question, with the indorsement of the plaintiff, came into the possession of the defendant on the day of their date, (January 17th, 1856,) and this suit was commenced and the preliminary injunction served two days thereafter, (January 19th.) As the circumstances under which the indorsements were obtained, if as alleged by the plaintiff, would not constitute a defense to an action at the suit of a bona

fide holder for value, this action was necessary to the protection of the plaintiff and was properly brought, and may be sustained, if the evidence sustains the allegation of fraud, and the defendants are not holders for value without notice of the fraud by which the plaintiff was induced to make the indorsement. Although, in case the defendant should continue the holder of the bills until after they matured, the plaintiff might, if his allegations are true, defend himself at law in any action to be brought, as against him, the defense would be of no avail as against any other person or corporation to whom the defendants might transfer them before due; and hence this action was necessary and proper. (*Reed* v. *The Bank of Newburgh*, 1 *Paige*, 215. *Coddington* v. *Bay*, 20 *John.* 637. *Hamilton* v. *Conway*, 1 *K.* 517.) That the indorsements were procured by a very gross fraud, is very clearly established by the evidence, and is not disputed by the counsel for the appellants. With this part of the finding of the justice, upon the trial, no fault was found upon the argument of the appeal, either in the printed points or otherwise; but on the contrary, it was conceded that the plaintiff was induced to indorse the bills by the false and fraudulent representations of the drawer, substantially as stated in the complaint, so that we are relieved from the examination of this branch of the case.

The serious question, and indeed the only question, upon the merits, is that arising out of the evidence of the circumstances and considerations of the transfer of the paper to the defendant; and upon this point there was some circumstantial but no substantial difference in the testimony of the two principal witnesses of the respective parties. The substance of the transaction is the same as detailed by both the witnesses. The drawers of the bills indorsed by the plaintiff were, at their date, indebted to the defendants to a large amount, upon negotiable paper not yet due, and to the amount of $4500 upon paper over due and under protest, and were in bad credit and actually insolvent. The drafts, with the indorsements of the plaintiff, were procured in order to provide for the debt past due which was represented by two bills of Osborn's on the firm of Osborn, Turnbull &

McDonald, for $2000 and $2500, respectively, and that indebtedness constituted the only consideration of their transfer to the defendants. The protested drafts were not delivered to the parties at the time of the transfer of the new bills, but on the evening of the 19th of January, a short time before the service of the papers for the commencement of this action, the parties to the old drafts were credited with the avails of the new, and charged with the old, together with the expenses of the protest, &c., and the latter were marked or cut with the canceling iron of the bank and placed in a drawer with papers of the like character, where they remained up to the time of the trial. This was the transaction, and it must speak for itself. It was carried out, in substance, according to the understanding of the parties. There was no express agreement that the new bills should or should not be taken in absolute payment of the protested paper, or as collateral security for it. It was, doubtless, the understanding of both parties, that the debtors should have the benefit of the new paper in liquidation of the old, that the difference in amount between the two, growing out of the accumulation of interest, protest &c., should be settled and paid by the parties liable. The form which the transaction took upon the books of the defendants, and the disposal of the pretended paper, was the result of an orderly and proper method of bookkeeping and the course of business which was deemed proper by the officers of the bank under the circumstances, rather than by any express agreement between the parties.

Whether a title acquired under these circumstances, and upon this consideration, is a valid title as one acquired *bona fide* and for value, and perfect as against the equities of the plaintiff, is the principal question made upon the appeal; for although the counsel for the respondents makes a point upon the complicity of the cashier and the defendant in the fraud perpetrated upon the plaintiff, there is no proper allegation of such fraudulent combination, in the complaint, and the judge at the circuit did not base his decision upon any such fact; and it is not therefore deemed necessary to examine the evidence which it is

claimed bears upon the question. In other words, as the case comes before us that question is not in it. That a holder for value can alone retain as against the defrauded party, or enforce the collection of, negotiable paper procured by fraud, is not questioned. (*Rogers* v. *Morton*, 12 *Wend.* 484. 14 *id.* 575.) It is conceded that something more is necessary to support the title of the holder, as against the true owner who has been fraudulently deprived of negotiable paper, or against the parties to such paper, obtained by fraud or without consideration, than that which must be sufficient as a consideration to support a transfer as between the parties negotiating it. In this case the bills were transferred to the defendants in the ordinary course of business and upon a good consideration as between them and Osborn, who, in the absence of any fraud, was fully authorized to deliver them to the defendants, so as to bind the plaintiff as indorser; but the question is whether they were transferred for value given at the time, so as to protect the defendants against the equities of the plaintiff. The general principle is settled in the case of *Bay* v. *Coddington*, (5 *John. Ch. Rep.* 54, *and* 20 *John.* 637,) that the consideration which will protect the indorser of negotiable paper against the latent equities of parties or third persons, must be something of value parted with in fact at the time, in money or property—some responsibility incurred—or some right relinquished, upon the faith and credit of the paper. This is fully recognized in all the cases to be found in our books, and the only difficulty has arisen in the application of this principle to the circumstances of each case. A precedent debt, when the note or bill is taken in payment and satisfaction of it, and securities are given up or lost in consideration of the transfer, has been held a sufficient consideration as a present parting with value on the faith of the note. One difficulty in this case is in the want of evidence that the bills in question were taken in payment of the precedent debt of Osborn, so as to bring this case within the principle contended for. The judge has found that they were not so taken, and his conclusion appears to be warranted by the evidence, and the course of the decisions in this state. As be-

tween the defendant and these original debtors, it could not have been claimed by the latter, under the authorities, that their liability was discharged by the transfer of these drafts, unless payment resulted from them. There was certainly no express agreement that they should be received in absolute payment. Upon the refusal of the drawees to accept, or upon the dishonor of the bills at maturity, the defendants could have resorted to the original liability of the debtors, and maintained an action against them upon the protested drafts. *Olcott* v. *Rathbone*, 5 *Wend.* 490. *Cole* v. *Sacket*, 1 *Hill*, 516.) The new bills were but the bills of the debtors themselves, and not the paper of a third person. The plaintiff was the accommodation indorser of the debtors, and was known by the defendants' cashier to be such, which would bring the case within the principle of *Cole* v. *Sackett*, *Watervliet Bank* v. *White*, (1 *Denio*, 608;) *Waydell* v. *Luer*, (5 *Hill*, 442; 3 *Denio*, 418;) *Highland Bank* v. *Dubois*, (5 *Den.* 558;) *Elwood* v. *Deifendorff*, (5 *Barb.* 398.) If the transfer was not in payment and discharge of the prior indebtedness, as between the parties, and without affirmative evidence of the fact it could not be presumed, then it was not a transfer in payment so as to cut off the equities of third persons. I have met with no case in our own courts in which a transfer of commercial paper has been held to have been in payment of an existing debt so as to affect the parties to the paper transferred, as the persons claiming title to it, in which it was not in fact payment as between the parties to it. It is possible that the convenience and security of those dealing in commercial paper require that the law as held in this state should be somewhat modified, and perhaps be made to conform to the opinion of Justice Story, in *Swift* v. *Tyson*, (16 *Peters*, 1;) but if this be so held it can only properly be done by the court of last resort, who can alone authoritatively review and modify the decision of the court for the correction of errors.

The decisions in our own state are not, I think, inconsistent with each other, and with the exception of the case of *White* v. *Springfield Bank*, (3 *Sandf. S. C. R.* 222,) there has been no attempt to detract from the force of the case of *Coddington* v.

Bay, (20 *John.* 636,) or the leading opinion of the chancellor in *Stalker* v. *McDonald*, (6 *Hill*, 93.) In *Coddington* v. *Bay* the notes were transferred to the defendants to indemnify them against responsibilities already incurred for the party transferring them. Chief Justice Spencer says, "Now I understand by the usual course of trade, not that the holder shall receive the bills or notes thus obtained as securities for antecedent debts, but that he shall take them in his business and as payment for a debt contracted at the time." If the judge was right in his conclusion, as I think he was, that the drafts in question were not transferred in payment, absolutely, of the prior indebtedness of Osborn, Turnbull & McDonald, they were of course received as security, and the case is directly within *Coddington* v. *Bay*.

The next case was that of *Wardell* v. *Howell*, (9 *Wend.* 170,) and there the note was transferred as collateral security for a prior debt, and in consideration of its receipt the plaintiff discontinued a suit which he had commenced against the debtor, and gave him time. This was not held a sufficient giving up or parting with any valuable right or thing to give the party the rights of a *bona fide* holder for value. In *Rosa* v. *Brotherson*, (10 *Wend.* 85,) the question was directly presented, and it was expressly decided that when a creditor receives the transfer of a negotiable note in payment of a precedent debt, he takes it subject to all equities existing between the original parties. In this case it did not appear that any security was given up. Chancellor Walworth says, in *Stalker* v. *McDonald*, that there is no doubt that *Rosa* v. *Brotherson* follows the decision of *Coddington* v. *Bay*. In *Payne* v. *Cutler*, (13 *Wend.* 605,) the notes were transferred and the value of them allowed on a settlement of accounts with the payee, and it was held that the holders were not holders for value, and that the consideration was inquirable into in an action by them against the maker. Chief Justice Savage says, "The plaintiff in this case neither having advanced any thing nor incurred liability on the credit of these notes, we must on this motion assume that the notes were obtained by fraud, and the defense was therefore proper." *Francia* v. *Joseph*, (3 *Edw. Ch.* 182,) was, like this, an equi

table claim to recover possession of a promissory note which, as was alleged, had been fraudulently diverted from its proper use, and the defendant had received it as security for a precedent debt, of one who held it as the agent of the plaintiff, and had on receiving it given up another note made by a third person, which had been deposited with them as security for the same debt, and their title was declared invalid as against the claims of the rightful owner of the note. *The Bank of Salina* v. *Babcock*, (21 *Wend.* 499,) was decided upon grounds which were supposed to make the case an exception to the general rule, and was not considered by the court pronouncing it as overruling any of the antecedent cases in our own courts. The court held that the plaintiff did pay value for the note in the strict sense of the term. Ch. J. Nelson says, "The proceeds of the note were placed to the credit of Trowbridge & Co. for whom it was discounted and were drawn out; not, I admit, by checking for the money, but by the *cancellation* of securities held by the plaintiff, which was the same thing in legal effect. By this cancellation a responsible indorser had been discharged, or if not discharged, the remedy against him had been rendered doubtful. Upon this distinguishing feature of the case the decision is rested." *The Bank of St. Albans* v. *Gilliland*, (23 *Wend.* 311,) was put upon the ground that the note was taken by the plaintiff in full *satisfaction of the prior indebtedness, without recourse and the debt discharged.* The court, in giving judgment, reaffirms the doctrine that "receiving a note for a *precedent debt* is not receiving it for value, within mercantile usage," and refers approvingly to the cases sustaining the doctrine. The plaintiff had discharged the personal responsibility of the original debtors on the credit of the note, and had thus parted with value. The decision in the case of *The Bank of Sandusky* v. *Scoville*, (24 *Wend.* 115,) is placed by the court upon the same principle. Bronson, J., says, "The note was *discounted* by the plaintiff for the benefit of Ward to extinguish his debt, and the avails went to *discharge* his liability to the bank." Emphasis is laid upon the fact that a debt was "extinguished," and a personal liability of the original debtor "discharged." *The Mohawk Bank* v. *Corey*, (1

Hill, 512,) was an action against the defendant as the indorser of the note of one Borst, which had been transferred to the plaintiff in *payment* of two notes of the same maker, indorsed by one Voorhees, which were delivered up, and a suit which had been commenced was thus discontinued. The court held, 1st, that there had been no diversion of the note from the purpose for which it was made and indorsed; and 2d, that if there had been, the plaintiffs would still be entitled to recover as *bona fide* holders for value, within the principle of *The Bank of Salina* v. *Babcock*. Securities had been given up. *Stalker* v. *McDonald*, (6 *Hill*, 93,) affirms a judgment of the supreme court, to the effect that the holder of negotiable paper would not be protected as against the equities of third persons when it appeared that the paper was received as a security for an antecedent debt, and the holders neither parted with value on the credit of it, nor relinquished any previous security. This is probably the extent to which the case goes as authority; but the chancellor, whose opinion is entitled to great weight, expresses the opinion that it would be the same if the paper were received nominally as payment. He does this upon a full review of all the cases, English and American, and giving to the cases in the 21st and 24th Wendell their full effect as deciding correctly the questions presented by them under the circumstances disclosed. *Small* v. *Smith*, (1 *Denio*, 583,) was somewhat similar in its circumstances to this case, omitting what was done by the defendants at their banking house after the transaction between them and Osborn had been consummated, and in the absence of the latter. The plaintiff had a debt against the maker of the note in suit, and pressed him for security, and agreed to take his note at one year, indorsed by the defendant, and the note was procured and delivered accordingly. Judge Beardsley, in delivering the opinion of the court, held that it was error in the circuit judge to submit to the jury whether the note was received in satisfaction of the prior indebtedness, as there was no evidence tending to show that fact. The case was decided upon another point.

The Seneca County Bank v. *Neass*, (5 *Denio*, 329,) simply recognizes the principle that the *satisfaction* of a precedent

debt may form a valuable consideration for the transfer of negotiable paper; but the case was decided upon another ground, and the question now presented was not considered by the court. *White* v. *The Springfield Bank*, (1 *Barb. Sup. C. R.* 225,) was not a well considered case, and under the circumstances, if they appeared upon that motion as they were developed upon the hearing of the case upon the merits, the decision might well have been different, and yet been consistent with all the cases that had gone before it. *Stewart* v. *Small*, (2 *Barb. Sup. C. R.* 559,) decided that a person could not be said to have parted with value for a note when he had only given credit for the amount of it upon the note of an insolvent party, which he knew to be of no value; and that is all that has been done by the defendants in this action, upon the credit of the drafts which they claim to retain and enforce against the plaintiffs. The case cited was decided by Judges Cady, Willard and Edmonds, and the argument of Judge Cady was entirely applicable to the points of this case. In *Montross* v. *Clark*, (2 *Sand. S. C. R.* 115,) the note in suit was transferred to the plaintiff in part payment of a note they held against the payee, and Judge Sandford instructed the jury that if the note had been diverted from the purpose for which it was made by the defendant, and sent to the payee, the plaintiffs could not recover. Thus directly affirming the doctrine of *Rosa* v. *Brotherson*, and the other cases cited. Of course what Vanderpoel, J., said upon this point, the plaintiff having recovered, is entirely *obiter*, and the remark was not as well considered as it would have been if it had been material to the case. *Spear* v. *Myers*, (6 *Barb.* 445,) was decided by Judges Jones, Edmonds and Edwards, and distinctly reaffirms the doctrine of *Rosa* v. *Brotherson*, that parties who receive a note which has been improperly put in circulation, in payment of an existing debt, without parting with any value for it at the time, or surrendering any securities, are not entitled to hold it, as against the rightful owner. The plaintiffs had received the note from Knapp, their debtor, in payment of their debt, gave him a receipt for it, and balanced the accounts on the books. This is certainly as much as was done by the

defendants here, for their canceling iron was of no more force, applied to the papers, than was the receipt given to the party. Both acts are open to explanation. (*Watervliet Bank* v. *White*, 1 *Denio*, 608.) *White* v. *The Springfield Bank*, which was before Judge Edmonds in 1 *Barbour*, was before the superior court of the city of New York, on its merits, and is reported in 3 *Sand. S. C. R.* 222. The case was one of an absolute discharge of a precedent debt, and also one in which the defendants having collateral securities to a given amount and which covered the draft given up on the receipt of the note of the plaintiffs, made other advances in lieu of the advance made upon the draft, and which further advances fully exhausted the collaterals, so that the defendants made a case of very strong equity. By acting upon the faith and credit of the plaintiff's note they had parted with value, and unless permitted to retain the note, they would be the losers to the full amount. But in this case the defendants are in as good a situation, if they are compelled to surrender the bills indorsed by the plaintiffs, as they would have been if they had never taken them. They parted with nothing, and if they can collect the drafts, they are by so much the gainers by the experiment

Youngs v. *Lee*, (18 *Barb.* 187, *affirmed* 2 *Kernan*, 551,) was well decided, in accordance with the previous decisions by the courts of this state. In consideration of the note in suit, the plaintiff had withdrawn from the bank another note of the party before it reached maturity, and surrendered it to the maker on receiving from him a new note payable in three months, indorsed by a third person. In other words, they had taken the note sued on, in satisfaction of a debt not yet due, and surrendered the evidence of that debt. The decision in the court of appeals was put upon this ground alone. Judge Johnson says, "In the case before us the note was received in extinguishment of a demand upon a note not yet due, and the note was delivered up. The surrender upon the consideration of a security not due extinguished the security. The plaintiffs therefore became holders for value, and are entitled to recover."

There was nothing in this case like the surrender of any se-

curity by the defendant, upon receiving the drafts indorsed by the plaintiff. The transaction, as between them and Osborn, was complete when the latter delivered to them the drafts. No other act was necessary, or was contemplated, to vest the title to the drafts in them, and they were then the holders of both sets of securities. The one was therefore collateral to the other, as found by the judge. The subsequent acts of the defendants were performed of their own volition, and not at the request or for the benefit of any third party, or in performance of any part of the agreement under which they acquired title to the paper. Their own acts cannot be resorted to to fortify their own title. They were, however, of no legal importance, even if done with the knowledge and assent of Osborn. The equities of the plaintiff are very manifest, and the defendant has failed to show a legal title to the drafts which can overcome them. The objection to the evidence of what passed between Osborn and the plaintiff at the time the indorsements were procured, is clearly untenable. The gist of the action, and the foundation of the plaintiff's equities, is the false and fraudulent representations of Osborn; and to shut out the evidence of the declarations of Osborn would be simply to debar the injured party of all relief. The complaint does not necessarily mean that the representations were made in the presence of the defendants' cashier, and if it did, that part of the averment would be immaterial, so far as the case upon which relief was finally granted is concerned, and might well have been disregarded or considered as struck out as surplusage. The proof offered, of the purpose for which the drafts remained in the possession of the defendant after the 19th day of January, 1856, was inadmissible, as only tending to show the understanding of the defendant of the agreement and the resulting legal rights of the parties, and this too after *lis mota* the practical construction of the agreement by the defendants after suit brought. The offer of the defendant to contradict Osborn as to an immaterial fact, to wit, the circumstances attending another transaction, a prior loan from the defendants of $5000, with which the plaintiff was not connected, was properly excluded. As to that matter the defend-

ants had made Osborn their own witness, and were not allowed to contradict him by way of impeachment. So too, the evidence offered that the witnesses for the defendant refused to swear, in the affidavit which was introduced with a view to discredit him, to something much more favorable to the defendant and much more discordant with his evidence on the trial than was actually sworn to by him in the affidavit, was not competent, as it did not explain the facts stated in the affidavit, or tend to qualify them or explain or account for the discrepancy, if any existed between the statements in the affidavit and the evidence given on the trial.

These are all the questions, and all the exceptions, which were made by the counsel for the defendants in his printed points or presented by him upon the argument; and I am unable to discover any error calling for a reversal of the judgment. The judgment must be affirmed with costs.

Bacon, J. That the name of the plaintiff was procured to be placed upon the paper in question by gross fraud and misrepresentation is transparent upon the evidence, and is found by the justice before whom the trial took place. The only important question is whether it was received by the defendant in good faith and in the usual course of business, and whether the bank parted with securities, or extinguished an antecedent indebtedness; or whether it was received only as collateral security and the indebtedness remained undischarged. The judge has found as a matter of fact that there was no agreement between Pomeroy and Osborn, that the drafts in question should be received by the defendant in payment of the prior drafts then under protest, but that on the part of Osborn they were delivered with the intention that they should be held as additional and collateral security to the indebtedness then existing in favor of the defendant. This conclusion is one drawn from the evidence in the case, and it seems to me it is conclusive as to the respective rights of the parties. The law is well settled, after a long series of adjudications in this state, that where paper thus obtained in fraud of the party executing it, is parted with to an innocent

holder, in the usual course of trade, for a valuable consideration, such holder will be protected. But the valuable consideration must be either a new advance made at the time, or some prior security must be parted with, or an existing indebtedness actually discharged, in order to complete the title of the holder. See *Stalker* v. *McDonald*, (6 *Hill*, 93,) following and reaffirming the decision in the case of *Coddington* v. *Bay*, (20 *John.* 636,) and numerous cases since. Merely giving this the form of canceling the old drafts and still retaining them, was no discharge of the securities, nor did it exonerate the parties thereon from liability. But the finding of the court that the drafts indorsed by the plaintiff were delivered merely as collateral security, in my judgment puts an end to the question.

I see nothing in the several objections made in the course of the trial, and the rulings thereon, which requires notice; and upon the whole case my opinion is that the judgment should be affirmed.

HUBBARD, J., and PRATT, J., concurred.

Judgment affirmed.

[JEFFERSON GENERAL TERM, April 7, 1857. *Hubbard, Pratt, Bacon* and *W. F. Allen*, Justices.]

---

24 570
17h 313
49h 182
32a 191

THE PEOPLE, *ex rel.* Gray, *vs.* THE MEDICAL SOCIETY OF THE COUNTY OF ERIE.

The power given, by statute, to medical societies, to make by-laws and regulations relative to the admission and expulsion of members, although conferred in general terms, is not an arbitrary, unlimited power. The by-laws, rules and regulations are not to be contrary to, nor inconsistent with, the laws of the state.

A by-law must be reasonable, and adapted to the purposes of the corporation.

Where a medical society established a tariff of fees, for medical services to be performed by its members, and fixed a minimum salary to be received by any member who should be appointed to any public office, in a professional capa-

city, and adopted a resolution declaring that it should be dishonorable for any member of the society to accept any appointment or perform any services contained in such tariff of prices, at a less sum than was therein specified; and subsequently, in pursuance of a by-law to that effect, expelled a member for a violation of this regulation; *Held* that the regulation was void, as being unreasonable, and against public policy, and contrary to law; that the expulsion of the member was unauthorized and illegal; and that a mandamus would lie, directing that he be restored, or recognized as a member of the medical society.

MOTION for an alternative mandamus. The relator represented that he had been duly licensed to practice as a physician and surgeon in this state. That at a regular meeting of the Medical Society of the County of Erie, held in January, 1850, he was duly admitted a member of the society. That at a semi-annual meeting of the society, held in June, 1854, a tariff of fees for medical services and medical appointments in and for the city of Buffalo and Erie county was adopted, in the absence of the relator, viz: "For physician to the almshouse of the county, $600 the minimum price; for physician to the penitentiary of the county, $300 as the minimum price; for physician to the jail of the county, $150 as the minimum price; for physician to the poor of the city of Buffalo, for medical district No. 1, $250; district No. 2. $125; district No. 3, $125; district No. 4, $100; for attending coroners' inquests, post mortem examination, $10, and for viewing body, $5, mileage to be charged according to the rates of the Buffalo fee bill; for health physician of the city of Buffalo, $1000 as the minimum price." The society, at the same meeting, also adopted a resolution that it should be dishonorable for any member of the society to accept any appointment or perform any services contained in such tariff of prices at a less sum than therein specified. In October, 1855, the relator was appointed by the board of supervisors of the county of Erie to visit the jail and perform medical services there when required during the year then ensuing, at and for the compensation of one dollar a visit. The relator accepted the appointment and entered into an agreement with the board of supervisors and entered upon the performance of the agreement.

At the semi-annual meeting of the medical society, certain

proceedings were had in relation to the relator, and a committee was appointed to report upon the subject of complaint. The committee reported among other things, that the relator had been guilty of an infraction of the laws of the society, and reported certain resolutions which were adopted by the society, as follows: 1st. That accepting to serve the public authorities for any other minimum amount and by any other manner of compensation than by salary, as fixed by the rules of the society, is a clear and palpable infraction of its laws. 2d. That the action of Dr. Gray in accepting office, as admitted by himself before the society this day, merits and hereby receives an expression of the disapprobation of the society; and that provided he immediately retires from the position which he holds in violation of the rules of the society, farther action in the case shall be waived. A copy of the resolutions was served upon the relator, who declined to retire from the position he occupied under his contract with the board of supervisors. At an adjourned meeting of the society, the relator was, by a vote of the members of the society, expelled from the society, for the cause here stated. At a subsequent meeting the society refused to recognize the relator as a member of the society, and to receive his vote at an election of officers of the society. The affidavit of the relator contained a very full and minute statement of the facts relating to the questions of his rights and his expulsion from membership. But the facts as here briefly stated are sufficient to present the real question, and the question discussed by the court.

James G. Hoyt, for the relator.

J. Thompson, for the defendant.

MARVIN, J. The motion must be granted. It is impossible, in any view which I have been able to take of the question presented by this motion, to sustain the action and position of the "Medical Society of the County of Erie." The society has mistaken its rights and powers. It will be important to ascertain what this corporation is; the objects of its creation, and

the powers with which it is clothed, so far at least as to determine whether it was vested with the power exercised in the present case.

The corporation has its existence under the act "to incorporate medical societies, *for the purpose of regulating the practice* of physic and surgery in this state," passed April 10, 1813. The practice of physic and surgery, in the city of New York, was regulated by law as early as 1760. And general regulations for the whole state were adopted in 1767, by which the chancellor, a judge of the supreme court, or common pleas, or a master in chancery, was authorized to license physicians and surgeons to practice. In 1806 an act was passed establishing medical societies in the state, and a state medical society, and repealing the former act. The act of 1813 was a revision of the act of 1806. It is important to notice the preamble to the act of 1813, thus: "Whereas well regulated medical societies have been found to contribute to the diffusion of true science and particularly the healing art." The first section makes it lawful for physicians and surgeons in the several counties of the state, who were then authorized by law to practice in their several professions, except in those counties where medical societies had been then incorporated, to meet together and choose the officers named in the act, and upon being so organized, it was declared that such societies should be bodies corporate and politic. The medical societies of counties already incorporated were to continue to be bodies corporate and politic. The act contains many provisions touching the meetings and proceedings of the societies. They are authorized to examine students, and for this purpose to appoint censors and give diplomas. By the 13th section, the societies are authorized to make such by-laws and regulations relative to the affairs, concerns and property of said societies, relative to the admission and expulsion of members, and relative to such donations or contributions, as a majority of the members, at their annual meeting, shall think fit and proper; provided that such by-laws, rules and regulations be not contrary to, nor inconsistent with, the constitution and laws of this state &c.

The power is here given to make by-laws and regulations relative to the *admission and expulsion of members.* It is in general terms. But this is not an arbitrary, unlimited power. The by-laws, rules and regulations are not to be contrary to, nor inconsistent with, the laws of the state.

Regarding the tariff of prices for medical services, adopted at the semi-annual meeting in June, 1854, as a regulation, the question will arise whether it was a valid regulation, authorized by law, and whether for a violation of it by a member, the society had the power of expulsion. A serious doubt may be here raised whether, if the *matter* of the regulation is not objectionable, it ever had any binding force. This regulation was made at a *semi-annual* meeting of the corporation. The statute only authorizes the society to make by-laws and regulations at its *annual meeting.* It may be very important that the power to make by-laws, rules and regulations, for a violation of which penalties, upon members, may be imposed, should only be exercised at the *annual meeting*, or at certain times fixed by law so that all the members may know in advance, and attend. But I shall waive this question, and proceed at once to the important question in the case, whether the society had the authority to establish such regulation, and for a breach of it to expel the relator.

It is declared by one of the by-laws of the society, that every member who shall neglect or refuse to comply with the by-laws and regulations of this society &c., shall be expelled from said society, upon a vote of a majority of the members present. This can, of course, have no application, except to a neglect or a refusal to comply with such by-laws and regulations as the society was authorized, by law, to make, and also to enforce by expulsion.

When a corporation is duly erected the law tacitly annexes to it the power to make by-laws or private statutes for its government and support; so that the corporation in the present case would have had the power to make by-laws had the statute been silent upon that question. It is usual to confer the power by the charter or law authorizing the corporation. If the power is expressly conferred and in general terms, it is construed as an

authority, conferred for the purpose of enabling the corporation *to accomplish the objects of its creation, and the power, in its exercise, is to be limited to such objects or purposes.* (*Ang. & Ames on Corp.* 268. 2 *Kent*, 296. *Grant on Corp.* 76.)

A by-law must not be at variance with the general law of the land. It must be reasonable, and adapted to the purposes of the corporation. Kent says these corporate powers of legislation must be exercised reasonably, and in sound discretion, and strictly within the limits of the charter, and in perfect subordination to the constitution and general law of the land, and the rights dependent thereon. Subject to these limitations, the power to make by-laws may be sustained and enforced by just and competent pecuniary penalties. (2 *Kent*. 296. *Grant on Corp.* 76. *Ang. & Ames*, 275, 281, 286. *King* v. *Corp. of Newcastle*, 7 *T. R.* 548. *King* v. *Toppenden*, 3 *East*, 186.)

What were the objects and purposes of the corporation? In the preamble to the act the legislature say, that well regulated medical societies have been found to contribute to the *diffusion of true science, and particularly the knowledge of the healing art.* The act then authorizes the physicians and surgeons in the several counties of the state to meet and choose certain officers, and when so organized, declares them to be bodies corporate and politic. It provides for the examination and licensing of students and for the mode of managing its affairs.

Can it be said, with any plausibility, that the establishing of a tariff of prices for medical services, was a legitimate object of the creation of the corporation, or that it was necessary, or, in any degree contributed to the accomplishment of the purposes or objects for which the law authorized the corporation? I can see no connection between the purposes to be accomplished by the creation of the corporation, and its regulation touching the compensation to be exacted by its members for services to be rendered to the public authorities of Erie county and the city of Buffalo. And I have not understood the corporation or its counsel, as putting the vindication of this regulation upon such ground: and yet, as we see by the well settled rules of law, unless it can be vindicated upon such ground, it cannot be

sustained as a regulation, or by-law, binding upon the members of the corporation.

All the purposes of the corporation can be well accomplished without interfering in the least, with the natural and private rights of each member to agree with the public authorities or others, for such compensation for his services as he may please. The rule established by the society is unreasonable; not that it fixes an unreasonable price for the specified services, (as to that I do not know,) but it is unreasonably restraining and oppressive upon its members. It interferes with their private rights.

The regulation was not only unauthorized by the law but it is in conflict with well settled principles of law. It was the result of a combination to coerce the public authorities of Erie county and the city of Buffalo, to make a certain compensation for certain medical services, not less than a minimum sum fixed. Such a combination is, I have no doubt, unlawful at common law. It is in restraint of the rights of the public authorities and the individual members of the society.

It is made the duty of the superintendents of the poor to appoint a physician of the poor-house, (*Laws of* 1851, *p.* 532.) And yet, if the regulation of the medical society of Erie county is to prevail, and is to be obeyed by the members of the society, the superintendent of the poor will not be able to procure the medical services of any one of the members of the society without paying the compensation fixed and without any regard to the state of health of the county poor, or the amount of services that may be required. A physician, entirely competent, may be willing to render the services for half the sum fixed in the tariff, and yet if he adheres to the regulation he must decline the employment. This entire regulation is in conflict with the law of the land, and cannot be sustained. It conflicts with the law and its policy in relation to contracts and trade. The law permits and encourages great freedom in contracts and in trade and is constantly inviting competition. The skill of the professional man is his capital in trade; and he has a right to employ it for a compensation satisfactory to

him, and thus obtain a livelihood. (*Angell & Ames on Corp.* 275. 3 *East*, 186. 1 *Blk. Com.* 876.) See *Dunham* v. *Trustees of Rochester*, (5 *Cowen*, 462,) where a by-law was held to be unauthorized as not being *prudential*, and as being against the freedom of trade.

In *The People* v. *Medical Society of New York*, (3 *Wend.* 426,) it was held that an initiation fee may be demanded from physicians and surgeons on becoming members of county medical societies. It was held that such charge was not contrary to or inconsistent with the laws of the state, and that it was usual in most societies of the kind. It might well have been added, that by the 15th section of the act of 1813, the power to charge an *admission* fee is impliedly given.

Enough has been said, I think, to show that the regulation in question was wholly unauthorized, and that it conflicts with public policy and the general law of the land. It follows that the expulsion of the relator was unjustifiable.

It seems to have been supposed that, having adopted this regulation, and having provided in the by-laws that every member who should neglect or refuse to comply with the by-laws and regulations of the society, should be expelled upon a vote of a majority of the members present, the society had the right, in the way of discipline, to expel a non-complying member. The rights of a member do not depend upon so frail a tenure. They are rights regulated and protected by law. The society is not simply a voluntary association of gentlemen, for social purposes or mutual improvement, under rules and regulations as adopted by themselves. But it is organized under the statute, and such organization is a corporation. Its powers are derived from the statute, and its members have certain well defined and valuable rights. Such rights are a franchise, and expulsion is disfranchisement. I shall not stop here to show the importance of the relator's rights as a member of the society. The law has made it his duty to become a member. That his rights were important and valuable is not denied. Expulsion or disfranchisement is a matter of serious import, and it is important to advert to some of the rules of law relating

to such questions. Disfranchisement is defined to be the taking a franchise from a man for *some reasonable cause.* (*Grant on Corp.* 263.) The author remarks that, to entrust corporations with an arbitrary power of the kind, would tend greatly to disturb the peace of corporations, and to defeat many of the objects of their institution, for it would furnish ready means to an unscrupulous majority, of compassing many pri vate and personal objects of their own, by means of the corpo rate charter. The legal causes of disfranchisement are thus stated. 1. Offenses against the corporator's duty to the corporation, as a member of it. 2. Offenses of a heinous, infamous character, affecting the corporator's duty as a subject, being indictable at common law. 3. Offenses compounded of the two. It will not be necessary to notice the 2d and 3d causes. Was the relator guilty of any offense against his duty to the corporation? It has been laid down as a rule that such offenses consist of "things done that work to the destruction of the body corporate, or to the destruction of the liberties and privileges thereof." (*Grant on Corp.* 264. 2 *Kent's Com.* 297 *to* 299. *Angell & Ames on Corp.* 349, 350.)

This rule may be somewhat too restricted in some special cases, but it is the general and leading rule, and rarely departed from. If the member does acts calculated to destroy the corporation or its liberties and privileges, he may be disfranchised. He thus forfeits his right to membership.

The Commonwealth v. *St. Patrick Benevolent Society*, (2 *Binn. R.* 441,) is much in point in this case. In that case by a by-law, *vilifying any member*, was declared to be a crime against the society, and for such crime, expulsion was authorized. One of its members was convicted under the by-law, and expelled. The court, after stating and recognizing the above rules, declared the by-law void and ordered the restoration of the expelled member. The test applied was, whether the by-law was necessary for the good government and support of the affairs of the corporation; and it was held that it was not, and that without an express power in the charter, no man can be disfranchised, unless he has been guilty of some offense, which

either affects the interests or good government of the corporation, or is indictable by the law of the land.

Fawcett v. *Charles*, (13 *Wend.* 473.) is instructive upon the question. In that case it was held that a county medical society had not the power to expel a member for the cause that he did not possess the requisite qualifications and obtained his admission by false pretenses. The leading rules, as above stated, are referred to with approbation, and it was held that such society, being a body corporate, has the power of expulsion, as an incident to its constitution; that the power cannot be exercised without a previous conviction on indictment in a criminal court for the offense charged, except when the offense relates merely to the official or corporate character of the accused, and amounts to a breach of the condition expressly or tacitly annexed to his franchise.

By the revised statutes concerning the practice of physic and surgery in this state, county medical societies are authorized to prefer specific charges against any member, of gross ignorance or misconduct in his profession, or of immoral conduct or habits. These charges are to be tried by the judges of the county court, and if they find the charges true, they are to make an order expelling the member from the society or suspending him for a limited period. (1 *R. S.* 452, 3.) I refer to these provisions of the statute in connection with the three general rules as above stated touching the power of corporations to disfranchise a member, for the purpose of calling attention to the nature of the charges; gross ignorance, misconduct in his profession, immoral conduct or habits, and remarking that the legislature is supposed to have understood the rules as established by the common law, and that the cases specified in the act did not or might not come within those rules so as to authorize the societies to try the member and expel him; hence the legislature provided the remedy as specified in the statute. It did not confer the power upon the medical societies, but upon the judges of the county court. Here is a legislative intimation, showing the extreme care taken of the rights of members of these societies, and admonishing the societies that their power of expulsion over its

members is not arbitrary, but confined and carefully restricted to the causes ascertained by the common law. (*See Matter of Newell Smith*, 10 *Wend.* 449; *Ex parte Paine*, 1 *Hill*, 665.)

I have examined this case at greater length, perhaps, than was necessary. *The People upon the relation of Hill against this Society*, presenting the same and other questions arising upon the pleadings, was argued very fully at the same time. In the present case it was conceded that the papers, upon this motion, present fully and fairly the real question between the parties. The controversy, between the society and the relator, seems to have been conducted in a spirit of fairness, frankness and courtesy. The society claiming the right of expulsion for the cause stated, and the relator controverting such right. The society is clearly in the wrong. The rights of its members, to the enjoyment of their franchises, are more secure than the society seems to have supposed, and the law will protect each member in the enjoyment of his rights, until such rights have been legally forfeited. In conclusion:

1. The regulation in question was unauthorized. 2. It was unreasonable. 3. It was against public policy and the law. 4. The disfranchisement of the relator was unauthorized and illegal.

It follows that he must be restored or recognized as a member of the medical society, and be permitted, without molestation, to enjoy all the rights and privileges of a member.

[Erie Special Term, July 6, 1857. *Marvin*, Justice.]

Ensign M. Clark *vs.* Sophia S. Clark and others.

If a married woman, seised of real estate which accrued to her during coverture does not avail herself of the right, given by the statute, to *convey* or *devise* the same, her husband will, upon her decease, become tenant by the curtesy whenever he would have been such tenant prior to the act of April, 1848, for the more effectual protection of the property of married women.

ACTION for partition. It appeared from the report of the referee, that Moses Clark died intestate, in September, 1855, seised in fee of the premises, and his wife died a day or two after. Ensign M. Clark, Sophia S. Clark and Lucy F. Cutter, wife of Chauncey F. Cutter, were the children and only heirs at law of Moses Clark. In August, 1856, Lucy F. Cutter died intestate, leaving Clifton H. Cutter and Alice Cutter her infant children and heirs at law. Her husband, Chauncey F. Cutter, is living. The referee reported that Clifton H. Cutter and Alice Cutter were each seised in fee and entitled to an equal undivided one-sixth part of the premises, subject to the life estate, or tenancy by curtesy, of their father, Chauncey C. Cutter. The guardian *ad litem* of the infant heirs objected to this part of the report, and claimed that the infant heirs of Mrs. Cutter inherited from their mother her portion of the land, discharged from any estate or right in the father.

A. Sawin, for Chauncey F. Cutter.

P. M. Vosburgh, for the infant heirs.

Marvin, J. Upon the argument of the question here presented, *Hard* v. *Cass*, (9 *Barb.* 366,) and *Sleight* v. *Read and others*, (18 *Barb.* 159,) were referred to, and one of the counsel assumed that these cases were in conflict. I do not so understand the cases. The question presented in the present case was not in the case of *Sleight* v. *Read*. The question in that case arose under very different circumstances and was decided upon principles long since established, independent of the acts of 1848 and 1849 for the more effectual protection of the property of married women. Nor is there any conflict in the opinions

of the learned justices in the two cases, touching the statute referred to.

Hurd v. *Cass* is in point, and I fully concur in the opinion of Justice Mason in that case. If the wife does not avail herself of the right, given by the statute, to *convey* or *devise* her real property, the husband will, upon her decease, become tenant by curtesy whenever he would have been such tenant prior to the act conferring the right upon the wife to convey and devise. I think this is clear upon the *principles* of the authorities cited by Justice Mason. In *Morgan* v. *Morgan*, (5 *Mad.* 408,) digested in *Crabb on Real Property*, § 1108, an estate was by marriage settlement conveyed to trustees in fee, upon trust for the separate use of the wife, with *power for her to make an appointment, and she made no appointment*, and upon her death it was held that the husband was entitled to curtesy. This was in a court of equity, applying to equitable estates the principles of the common law relating to legal estates. It will be seen that the estate was so situated that the wife had power over it, and could so have executed the power as to have deprived her husband of any right by the curtesy; and such is the effect of our statute. The wife has the right to convey or devise her lands. If she does so, her husband will not be entitled to a life estate by curtesy; if she does not, then he will. I am speaking, of course, of those cases where the wife took the estate during coverture.

In *Bennett* v. *Davis*, (2 *P. Wms.* 316; *Crabb on Real Property*, § 1106,) it appeared that it was the express intention of the section that the husband *should not be tenant by the curtesy* of lands devised to the wife, and it was held in equity that he was not entitled to the estate by curtesy, but was a mere trustee for the heirs of his wife, and a conveyance to the heirs was decreed. If the legislature had intended to deprive the husband of his rights by the curtesy, when the wife had not conveyed or devised the estate, it should have so expressly declared in the act. The referee has stated the rights of the parties correctly, and the exceptions or objections must be overruled.

[Erie Special Term, July 6, 1857. *Marvin*, Justice.]

BROWN and wife *vs.* TORREY, executor &c.

To avoid a will, on the ground of the mental disability of the testator, it is not enough that the testator may at some former period have been laboring under some disability; but the question is, had he the capacity to make a will at the time of the execution of the instrument.

Until the contrary appears, sanity is to be presumed: and where an act is sought to be avoided on the ground of mental disabilty, the burden of proof is on the party who alleges the disability.

A testator who died in 1853, aged 78 years, had for some years previous to the execution of his will, in 1843, been subject to occasional fits of epilepsy, which, for the time being, produced great physical prostration, and for a season enfeebled his mental energies, and impaired his power of memory. For many years he had been in the habit of taking large doses of laudanum, to relieve his sufferings. At times he was childish, and incapable of much effort of any kind, and failed, on a few occasions, to recognize his intimate acquaintances. On the other hand it was shown by several witnesses, that he gave directions in regard to his affairs, made bargains, and transacted business, and was consulted by his neighbors for the last 8 or 10 years of his life, and down to within a year or two of his death, and was esteemed a man of sound judgment and good business capacity. And it was shown by the testimony of the attorney who drew the will and the first codicil, and was present when they were executed, and by the person who drew the last two codicils and witnessed their execution, in 1847 and 1849, that on all those occasions the testator was apparently in the perfect possession of his faculties, and fully apprehended the nature of the business he was transacting, and avowed distinctly that the testamentary dispositions he then made were in precise accordance with his views and intentions. *Held* that the testator had sufficient mental capacity to dispose of his property by will; and the decree of the surrogate, admitting the will and codicils to probate, was affirmed.

APPEAL from a decree of the surrogate of the county of Onondaga, establishing the will of Dan Torrey, deceased, and the codicils thereto, and admitting the same to probate. The wife of the appellant, Lucius C. Brown, was one of the heirs at law of the testator, and the respondent, Harvey W. Torrey, was the executor named in the will.

D. D. Hillis, for the appellants.

Gardner & Burdick, for the respondent.

By the Court, BACON, J. This is an appeal from a decree of the surrogate of the county of Onondaga, admitting to probate the will and codicils of Dan Torrey, deceased. The original will was executed on the 9th of February, 1843, the first codicil in June, 1847, the second in September of the same year, and the third and last codicil in December, 1849, and the testator died in July, 1853, having attained the advanced age of 78 years. It was insisted by the contestants before the surrogate, and is argued on this appeal, that Dan Torrey was incompetent from mental imbecility to make the will, or either of the codicils, or if not wholly incompetent, yet that he was so far demented as to be unduly influenced, and was placed under such restraint by those who were most largely the subjects of his testamentary bounty, as to render the will and all the codicils, utterly invalid.

There has been a prior controversy between the defendants in this case and one of the heirs of Dan Torrey, in which the validity of a deed of Dan Torrey, executed cotemporaneously with the will of 1843, was drawn in question on the same grounds as those which are urged to set aside the will and subsequent codicils. Upon the evidence then given, which was substantially and in its essential features, the same as that introduced before the surrogate, the presiding justice held that there was not enough to authorize the plaintiffs to go to the jury on the questions of incompetency or undue influence, and on appeal, the judgment of the circuit was affirmed at the general term. Much that was said by the court in the opinion given on that occasion is quite applicable to the case as now presented on this appeal.

On the point of what is claimed as undue influence, and the advantage taken of the old man's condition to extort from him a disposition of his property, which was supposed to be unjust and unequal, there is less evidence given in this case than in the one formerly before the court. The principal beneficiaries under the will and codicils were the two sons, who had spent, as it seems, their lives thus far in aiding their parents to cultivate the farm and manage the business of the estate, and they

were naturally desirous of bettering their condition by some provision to secure their prospects in the future, if not a remuneration for their past services. Their suggestions as to leaving home to seek their fortunes in the west, doubtless operated to some extent on the testator's mind, to induce him to perform what he had frequently indicated his intention of doing. Although many suspicions were excited in the minds of the other relatives who had hoped ultimately to share in the inheritance, the case is very barren of facts which tend to show that such constraint was exercised upon the old man's freedom of will, as to compel on his part a tame surrender to arts and appliances which he had no power to resist, nor means to overcome. He appeared to have acted on very full consultation with his legal adviser and those around him, and to have executed his purposes with abundant forecast and ample deliberation. On this branch of the case there is nothing that tends to raise a plausible case on which it can be claimed that the will or codicils should be set aside.

The question then remains, whether the plaintiffs succeeded in showing such a want of capacity as to call upon the surrogate to refuse to admit the will and codicils to probate. The evidence accumulated upon this point, is doubtless calculated, at first sight, to make some impression, but carefully considered in the light of the rules that have been laid down as controlling such cases, possesses much less than its apparent force. The substance of the evidence is, that the testator had for some years been subject to occasional fits of epilepsy, which for the time being produced great physical prostration, and for a season doubtless enfeebled his mental energies, and impaired his power of memory. For many years he had been in the habit of taking large doses of laudanum to relieve his sufferings, which in an ordinary case might seem almost sufficient to prostrate both mind and body, and even to peril life. But he had strong recuperative powers, and had acquired, by long habits of indulgence, the capacity to resist the poisonous quality of the article in which he so freely indulged, and even, perhaps, to be temporarily sustained by it; like the ancient mon-

arch of whom it is written, that he fed upon poisons until they were not only innoxious, but seemed to impart even the quality of nutriment. At times the testator was childish and incapable of much effort of any kind, and failed, on a few occasions, to recognize those around him with whom he had long been familiar.

On the other hand, it is shown by several witnesses that he gave directions in regard to his affairs, made bargains and transacted business, and was consulted by his neighbors for the last eight or ten years of his life, and down to within a year or two of his death, and was esteemed a man of sound judgment and good business capacity. But more especially, and what is the most important part of the evidence, it is shown by the testimony of Mr. Leavenworth, who drew the will and the first codicil, and was present when they were executed, and by Mr. Burdick, who drew the two last codicils and superintended their execution, that on all those occasions he was apparently in the perfect possession of his faculties, and fully apprehended the nature of the business he was transacting, and avowed distinctly that the testamentary dispositions he then made were in precise accordance with his views and intentions. This should be conclusive as to his condition at the time those instruments were executed, and that is the important inquiry and controlling consideration in the case. It is not enough that a party may, at some prior period, have been laboring under some disability, but the question is, had he the capacity to do the act which he performed, at the time of its execution. Until the contrary appears, sanity is to be presumed; and where an act is sought to be avoided on the ground of mental disability, the burden of proof is on the party who alleges the disability. (*Jackson* v. *King*, 4 *Cowen*, 207.) Or, as it was well stated in this case, by the late Chief Justice Spencer, *arguendo*, "The burden of showing a want of capacity is upon the plaintiff; and if the defendant can rebut his evidence, by showing a general capacity, or a lucid interval accompanying the act, or sufficient mind to know what he was doing, the case on the defendant's part is made out. If he can

succeed even in neutralizing the evidence, the conclusion of law is that he was sane." This proposition, although stated by counsel, is yet, considering the source from which it proceeds, of authority almost equivalent to a judicial determination, and is abundantly borne out by the principles laid down in the celebrated case of *Stewart's Executor* v. *Lispenard*, (26 *Wend.* 255.) In that case it is said that courts in passing upon the validity of a will, do not measure the extent of the understanding of a testator, but if he be not wholly deprived of reason, whether he be wise or unwise, he is the lawful disposer of his property, and his will stands as a reason for his actions. It is said, still further in that case, that a man's capacity may be perfect to dispose of his property by a will, although he is inadequate to the management of other business, and incompetent to make contracts for the purchase and sale of property. There is no necessity, in this case, of pushing the principle to any such extent, for we have seen that the testator had this capacity, in addition to the *mens disponendi* which the surrogate has found he clearly possessed. See further on this point, *Blanchard* v. *Nestle*, (3 *Denio*, 37, *and note*.)

Upon the whole case, I am entirely satisfied that the surrogate came to a just conclusion, upon the hearing before him, and that his order should accordingly be affirmed.

[Oswego General Term, July 7, 1857. *Hubbard*, *Pratt*, *W. F. Allen* and *Bacon*, Justices.]

In the matter of the application of D. D. Conover *vs.* Charles Devlin.

To authorize an application under the statute (1 *R. S.* 125, § 50) for an order to compel the delivery of books and papers appertaining to a public office, it is sufficient that the applicant is in possession of the office, with color of title.

Upon such an application, the court will not decide the question of title to the office. If there is a reasonable doubt as to who is entitled to it, it must be determined on a direct proceeding for the purpose, by action of *quo warranto*.

In the matter of Conover *v.* Devlin.

As the title to the books and papers must ultimately depend on the title to the office, so the right to present possession depends on fact of present possession of the office to which they are appurtenant.

Where an office becomes vacant, and an individual, with claim and color of title, enters it and assumes the duties thereof, he is to be considered the officer *de facto*, and in possession of the office. And the fact that he has been forcibly removed from the rooms occupied for the transaction of the business of the office, and from the presence of the property pertaining to it, will not affect his legal rights.

Nor will the fact that a deputy of the former incumbent refuses to yield to the person claiming to be appointed to fill the vacancy, possession of the books and papers, and continues himself to transact the business of the office as such deputy, affect the rights of the claimant, or his possession.

THIS was a motion by the applicant, for an order compelling the respondent Devlin to deliver to him the books and papers appertaining to the office of street commissioner of the city of New York. The motion was made under 1 *R. S. p.* 125, § 56, which provides that when a person appointed or elected to an office shall die, and any books or papers appertaining to such office shall come to the hands of any person, the successor to such office may demand them, and on their being withheld, an order may be obtained, on application to a justice of the supreme court, for their delivery; and on the omission of the person to deliver them, a warrant may be issued, and the property delivered to the successor. The facts appeared to be that Joseph S. Taylor, the late incumbent of the office, was elected in November, 1855, for the term of three years from the first day of January following, (1856.) He entered and continued in the office until the 9th day of June, 1857, when he died. On the 12th day of June, Daniel D. Conover was appointed by the governor, in due form, to fill the place. On the 13th of June he took the oath of office required by law, and filed it with the proper officer. He also executed, on the same day, and filed with the proper officer, an official bond, with two sureties, in the penal sum of $10,000. He then proceeded to the rooms belonging to the city, occupied as the office or place of business of the street commissioner, entered them, claimed that he was street commissioner, exhibited his commission to the employees

and asserted authority over them and the business of the office, and locating himself at a desk, offered to perform, and did, in one instance at least, perform official business as street commissioner. He remained there, claiming to be in possession of the place and business, by virtue of his office, until the usual hour of closing the place for the day, when he left, as the place was closed. The next day he returned, resumed his place and official position, and remained some time there at his desk, at the place properly occupied by the head of the department, as he claimed to be. In the course of this day he was removed forcibly from the rooms. He returned next day, and was again removed by the same person. On these occasions his removal was without violence, but it was open and forcible, and with an expressed determination not to tolerate his presence there. The deputy street commissioner, who was rightfully in possession of the books and papers, and in charge of the business while the vacancy in the superior office continued, refused, throughout the time of the applicant's presence, to recognize his claims to official character, and withheld from him the manual control of the books and papers belonging to the office.

On the 16th of June, and after Conover's last removal from the premises, the respondent having received the appointment of the mayor, with consent of the board of aldermen, filed in the proper place his official oath and bond, duly approved, and entered the rooms and took possession of the books and papers, claiming to be street commissioner by virtue of his appointment, and thence hitherto has so continued.

On this state of facts the applicant demanded an order from the court, and a warrant by which he should be put in possession of the books and papers appertaining to the office.

D. D. Field, *W. Curtis Noyes* and *D. Field*, for the applicant.

First. Mr. Conover has been duly appointed to perform the duties of the office made vacant by the death of Mr. Taylor, the late street commissioner.

I. The constitution of the state (*Art.* 10, § 5) has made it

the duty of the legislature to provide for filling the vacancy occasioned by the death of the late incumbent, by declaring that "the legislature shall provide for filling vacancies in office."

II. The legislature, by the act of Feb. 3, 1849, provided that "whenever vacancies shall exist, or shall occur, in any of the offices of this state, where no provision is now made by law for filling the same, the governor shall appoint some suitable person, who may be eligible to the office so vacant, or to become vacant, until the commencement of the political year next succeeding the first annual election after the happening of the vacancy at which such officer could be, by law, elected." At the time of the passage of this act, no provision had been made by law for filling a vacancy in the office of street commissioner. Indeed the office itself was not known to the laws of the state. It then existed only by the by-laws or ordinances of the city. Since then it has been established by law. Unless, therefore, there be a subsequent law, providing another means of filling a vacancy in the office, and to that extent repealing the law of Feb. 3, 1849, the governor must fill it. And in determining the question of such repeal, we must bear in mind the well known rule, that repeals are to be clearly made out, and not admitted by implication, except in a clear case.

III. There have been, it is true, several subsequent statutes, providing for filling a vacancy in this office, viz: the act of April 2, 1849; the act of July 11, 1851; the act of April 12, 1853; and the act of June 14, 1853. But these statutes were all repealed by the present charter. The only law, therefore, remaining to be considered, is that passed April 14, 1857. And unless that gives the power of filling this vacancy to another officer, the power of the governor remains in force.

IV. The act of April 14, 1857, (the present charter,) does not provide for filling a vacancy occurring in June, 1857, in the office in question. There are two parts of the charter which have been supposed by some to have that effect. (1.) One of them is the 33d section, which declares that until the common council otherwise direct, the existing ordinances shall apply to the departments, so far as the same are applicable and

are not inconsistent with the charter. But it is clear that this section cannot apply, unless the common council would have power, by ordinance, to direct how the vacancy should be filled; which is begging the question. (2.) The only other part of the charter which is supposed by any one to give the power is that which—after providing that the mayor, comptroller and counsel shall be elected by the people—declares that "the other heads of departments shall be appointed by the mayor, with the advice and consent of the board of aldermen." But this provision does not attach to the mayor till the 1st of January, 1858, nor to the office of street commissioner till the 1st of January, 1860. This limitation to the 19th section is given by the 51st section, which is in these words: "The mayor, aldermen and councilmen, provided for in this act, shall be elected at the first election for charter officers to be held after the passage hereof, which election shall take place on the first Tuesday of December, 1857. All persons who shall have been elected under former laws, regulating or affecting the election of charter officers, and shall be in office at the time of the passage of this act, shall continue in office until the officers elected under this act shall take office, and no longer, except that the offices of commissioner of repairs and supplies, and of commissioner of streets and lamps are hereby abolished, and except that the persons now filling the several offices of comptroller, counsel to the corporation, street commissioner and city inspector, and the officers in the Croton aqueduct department, shall continue in office until the expiration of their several terms, and shall not be removed from office during such continuance, except for the cause and in the manner provided for in sections 20 and 49 of this act; and all other charter officers, and all school officers, and each governor of the almshouse, whose terms of office may expire with the present municipal year, shall also be elected on the day before provided for by this section."

Second. Mr. Conover having been duly appointed to the office, is entitled to an order for the delivery to him of the office books and papers, under the following section of the revised statutes: "If any person appointed or elected to any office

shall die, or his office shall in any way become vacant, and any books or papers belonging or appertaining to such office shall come to the hands of any person, the successor to such office may in like manner as herein before prescribed demand such books or papers from the person having the same in his possession; and on the same being withheld, an order may be obtained, and the person charged may in like manner make oath of the delivery of all such books and papers that ever came to his possession; and in case of omission to make such oath and to deliver up the books and papers so demanded, such person may be committed to jail, and a search warrant may be issued, and the property seized by virtue thereof may be delivered to the complainant, as herein before prescribed." (1 *R. S.* 336, § 66, 4*th ed.* *Matter of Whiting*, 2 *Barb. S. C. R.* 518.)

Third. The objection that Mr. Conover has not filed his oath of office and official bond, is not tenable. He has taken the oath, and, not being able to see the mayor, filed it in his office, with his clerk. He has executed a proper bond, with the requisite sureties, which the mayor refused to see, and it was therefore filed with the comptroller without the mayor's approval. The mayor could not defeat the execution of the office by refusing to decide upon the sufficiency of the sureties. Mr. Conover performed all the acts which it was his duty to perform. A dereliction of duty by the mayor cannot deprive him of his office, nor the public of his services.

Fourth. Nor is it a tenable objection that the constitution, (*Art.* 10, § 2,) requires that such city officers as were then known to the law, should be elected by city electors, or appointed by city authorities.

I. This was not an office established by law, at the formation of the constitution. Its first creation by law was in June, 1849.

II. This section of the constitution applies only to permanent officers, and not to persons appointed to exercise the functions of an office till it can be regularly filled.

III. The 2d section of the 10th article, and the 5th section of the same article, must stand and be construed together. While one provides that city officers shall be elected or appoint-

ed by city electors or authorities, the other directs that the legislature shall provide for filling vacancies in office. The construction which the constitution has heretofore received, accords with these views. In 1847, a law was passed, authorizing the governor to appoint a successor to Samuel Jones, on the bench of the superior court, although the constitution requires judicial officers in cities, to be elected by the city electors. (*Laws of* 1847, *ch.* 291.) So the law provides that persons to fill the offices of sheriffs, coroners, county clerks and district attorneys shall be appointed by the governor in case of a vacancy, though the constitution provides that all these officers shall be elected by the people of the counties. (*Laws* 1847, *ch.* 360. *Laws* 1848, *ch.* 4. *Laws* 1849, *ch.* 28. *Tappan* v. *Gray*, 9 *Paige*, 507. *Snediker's case, lately decided in the court of appeals.*)

R. Busteed, J. T. Brady and *A. J. Willard*, for the respondent.

First. This is a proceeding to try the title to the office of street commissioner. That trial cannot be had in this form. Mr. Conover must proceed either by *quo warranto*, or as directed by section 432 of the code. The summary method of giving possession of an office to one having a clear title to it, is not applicable here, where the party proceeded against claims under a formal appointment, and is admitted to be already in possession. (*People* v. *Stevens*, 5 *Hill*, 616. *Matter of Whiting*, 2 *Barb. S. C. R.* 513. *Matter of Welch*, 14 *id.* 396. *People* v. *Corporation of N. Y.* 3 *John. Cas.* 79.)

Second. Mr. Conover shows no title to the office of street commissioner of the city of New York. The charters of Dongan and Montgomerie, with the acts subsequently passed before 1857, conferred and recognized the power of the corporation of the city of New York to provide for the control, regulation and government of the streets by ordinances, by the appointment of suitable officers, and otherwise. These charters are continued in force. (*Charter of* 1857, § 54.) The charter of April 14 1857, continues the corporation, "with all the grants, powers and privileges heretofore held." (*See charter of* 1857.

§ 1.) The power above mentioned was exercised many years ago, by the appointment of a street commissioner for the city of New York. (*See Ordinances of* 1849, *p.* 35.) Until the year 1849, he was appointed in the manner prescribed by the charters, viz: by the mayor, with the advice and consent of the legislative department of the city government. The only material change made by the charter of 1849, in reference to the office of street commissioner, was to make it an elective office. (*Charter of* 1849, §§ 12–21.) The 20th section of that charter expressly provides, that in case of *vacancy* of any of said heads of departments, by removing from office or otherwise, the mayor, by and with the advice and consent of the board of aldermen, shall appoint a person to fill the same, *until the vacancy shall be filled by the electors at the next charter election.* The street commissioner is one of the heads of the departments here referred to. The 21st section of the same charter provides "that the several executive departments, and the *officers* and *clerks* thereof, shall be subject to the *legislative* direction and control of the common council so far as the same shall not be inconsistent with this act. The corporation, under the powers conferred upon them by charter, passed, in 1849, an ordinance regulating the executive departments, in which, among other things, they provided for the appointment of a deputy street commissioner, who, in the event of a vacancy in the head of the department, should perform the duties of street commissioner. The same ordinance provided that the vacancy in the head of the department should be filled by the mayor, with the advice and consent of the board of aldermen. (*See Charter of* 1849, §§ 19, 20 *and* 9; *Charter of* 1830, § 21; *Charter of* 1851, § 2; *Ordinances of* 1856, §§ 227, 234.) The charter of 1857 has not altered the organization of the street department, nor the mode of selecting its officers, nor the control or regulation of its action, otherwise than as follows: It restores the power of appointing the street commissioner to the mayor.

This charter does not deprive the mayor of the power to appoint a street commissioner in the event of the office becoming vacant before its term would expire by lapse of time. 1. The

provision which was to continue in office the person who was street commissioner when the charter of 1857 took effect, can not be taken to have assumed that no event, other than lapse of time, would render his office vacant. 2. And although the charter does not expressly provide for the filling of a vacancy occurring otherwise than by lapse of time, yet reasonable and just construction requires it to be so interpreted. A term may expire on the happening of any other event, as well as upon the coming of a given day. And as the power to appoint a street commissioner under the charter of 1857 was conferred on the mayor as to all cases, without any exception, it cannot be fairly supposed that any exception was to be taken as implied, or that in any event the governor of the state was to appoint that officer for the city. The charter negatives this idea in its whole theory and in its details. The 15th section declares that "the executive power of the corporation shall be vested in the mayor and the executive departments." In the 19th section it provides: "The other heads of the departments, (other than mayor, comptroller and counsel to the corporation,) shall be appointed by the mayor, with the advice and consent of the board of aldermen." 3. This power, claimed for the governor, is not conferred either by the constitution, the charter of 1857, or any other law, nor could it be constitutionally given to him. (1.) The act of 1849 applies only to state officers, and such alone as are elective. It is limited in terms, to "officers of the state." (2.) The state officers are named in the constitution, in the classification given in 1 *R. S.* 95. (3.) The street commissioner is a city officer. (4.) Where a vacancy is filled by the governor, under the law of 1849, the person appointed is to hold his office "until the commencement of the political year next succeeding the first annual election after the happening of the vacancy at which said officer could be by law elected." The street commissioner ceased to be elective, by the provisions in the charter of 1857. This provision in the statute of 1849, cannot therefore be applied to him, without producing this strange and absurd consequence, viz: Mr. Conover would hold until the 1st day of January, 1858, that being

the commencement of the political year next succeeding the first annual election after the happening of the vacancy, at which election a street commissioner, if the office had continued to be elective, might have been elected. That would be less than two years from the passage of the charter of 1857, which prescribes two years as the official term of the street commissioner. There would be, of course, another vacancy in the office on the 1st of January, 1858. According to the position of Mr. Conover's counsel, the mayor could not fill that vacancy. The governor would then appoint again, and the appointee would hold the office until the 1st day of January, 1860. It cannot be reasonably supposed that the legislature have made such a result possible. The constitution (*Art.* 10, § 2) provides that "all city, town and village officers whose appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose." If the act of 1849 can be construed as giving the governor the right, in any event, to appoint a street commissioner, who is a city officer, that act is clearly unconstitutional. But even if such act were valid, and could operate upon a city office, and an office not elective, yet it does not apply to the vacancy which occurred by Mr. Taylor's death, because, (1.) The charter of 1849, passed after the act of 1849, giving the governor his power over vacancies, provided, as already shown in these points, that a vacancy in this office should be filled by the mayor, with the advice and consent of the board of aldermen. (2.) When Mr. Taylor died, there was a deputy street commissioner who, under existing ordinances, had legal authority to perform the duties of street commissioner until one was appointed. (*Tappan* v. *Gray*, 9 *Paige*, 507.) But if it be held that the charter of 1857 gives the mayor no power to fill a vacancy occurring otherwise than by lapse of time, in the office of street commissioner, still that power belongs to the mayor, because: (1.) As already shown, the ordinance of 1849 gave it to him. (2.) That ordinance has never been repealed. (3.) It is expressly adopted and confirmed

by the 32d section of the charter of 1857, which provides that "until the common council shall otherwise direct, the existing ordinances shall apply to the departments herein mentioned, so far as the same are applicable thereto, and are not inconsistent with this act." If, therefore, the charter of 1857 is silent and ineffectual as to the vacancy by death, the ordinance which speaks on that subject is not inconsistent with the charter, and not being inconsistent, is continued in force by the act of the legislature, precisely as if in this respect it were written and embodied in that act. (4.) The power to appoint a street commissioner, irrespective of all legislation, resided in the corporation; and all legislation to the contrary being removed, that power revives. (5.) The constitution of this state prohibits the exercise of this power by the governor.

Third. Mr. Devlin is the street commissioner of the city of New York. He has been duly appointed by the mayor, by and with the advice and consent of the board of aldermen, and having duly taken the official oath, and given the official bond with sureties, is in possession of the office, with perfect legal right to hold it.

Fourth. This application, for the above reasons, should be denied.

D. D. Field, in reply.

First. The criticism which has been made upon the words "officers of this state," in the act of February 3, 1849, is altogether illusory. The street commissioner is one of the officers of this state. Every public officer who holds his authority under this state as sovereign is an officer of this state. If it were not so, the mayor need not take the oath to support the constitution of the United States, for that constitution only requires that officers "both of the United States and of the several states" should take the oath to support it. (*Art.* 6, § 3.) So the state constitution (*Art.* 12) requires "all officers, executive and judicial," to take the oath. If this does not include city officers, the mayor need not swear to support the state constitution. The revised statutes (1 *R. S.* 120, § 24, *sub.* 6; 121, § 33, *sub.* 6) include

city officers among the officers of the state. Equally illusory is the criticism upon the words of limitation which the same act contains, upon the time during which the *ad interim* incumbent shall hold. Mr. Conover can, in no event, hold longer than Mr. Taylor could have held, and, if the office had continued elective, as it was last year, he could have held only till the 1st of next January. The words "until the commencement of the political year next succeeding the first annual election after the happening of the vacancy at which such officers could be by law elected," are words of limitation upon the continuance of the vacancy. The language might have been in this form, with the same meaning. Whenever a vacancy exists in any office in this state, the governor shall fill it for the unexpired term; except that if the office be elective, the electors shall fill it at the first annual election, and the governor's appointment shall be good only till then.

Second. Indeed, the discussion which has been had in this case has narrowed the questions down to two: *first*, had the mayor the right to fill the office? and *second*, did the mayor, by refusing to decide upon Mr. Conover's bond, defeat his right to the possession of the papers of the office? The constitutionality of the act of July 3, 1849, its applicability to the vacancy in question, and the appropriateness of this proceeding to obtain possession of the papers, are too well settled or too clear for further argument.

Third. Had the present mayor the right to appoint a successor to Mr. Taylor, the late street commissioner? The right of a mayor, elected under the new charter, to appoint a street commissioner under that charter, need not be disputed. The dispute is whether a mayor, elected under the repealed charters can now, before the terms of the old officers are expired, appoint a new street commissioner to hold under the new charter. We say that he cannot.

I. The new charter was passed on the 14th of April, and took effect as a law on the 1st of May. But there are some parts of it prospective, and others present in their operation. For example, when the second section declares that the legislative power

shall be vested in a board of aldermen and a board of assistants, it refers to future aldermen and assistants. So the 3d, 4th and 5th sections refer to future officers only, and the 21st section refers to future officers.

II. Take now the 19th section, which is in these words. "The mayor, comptroller, and counsel to the corporation, shall each be elected by the electors of the city; the mayor for the term of two years, the counsel to the corporation for the term of three years, and the comptroller for the term of four years. The comptroller shall be voted for upon a separate ballot. The other heads of departments shall be appointed by the mayor, with the advice and consent of the board of aldermen. The board of aldermen shall have the power to confirm or reject all nominations of officers made by the mayor; and whenever any person nominated by the mayor shall be rejected by the board of aldermen, the mayor shall immediately nominate another person." It is perfectly certain that the comptroller and counsel to the corporation mentioned in this section are not the present comptroller and counsel. They were elected in 1856 for three years each. If the present comptroller and counsel are not included, in what rule of construction can it be thought that the present mayor and the present heads of departments, other than the comptroller and counsel are included?

III. When the departments are not re-organized, the charter was thus expressive: "there shall continue to be an executive department," &c., as in the 24th and 25th sections, referring to the Croton aqueduct and almshouse departments.

IV. A distinction is made by the act between officers *created by* the charter, and those *holding offices under it*. The 49th section declares that the grand jury may present any officers *created by* or *holding offices under* this charter. The government of the city, up to the 1st of January next, is wholly carried on by officers *created by* the charter. After that period it will be carried on by officers wholly elected by the people or appointed by the mayor, and *holding under the charter*—though as to the offices of comptroller, counsel, street commissioner, city inspector, and of the Croton aqueduct department, it

will still be carried on by officers *created by* the charter, until the first day of January, 1860, when the whole machinery of the city government will be worked by officers elected and appointed, and *holding under* the charter.

V. The 51st section provides for carrying on the city government through these several periods: "§ 51. The mayor, aldermen and councilmen provided for in this act shall be elected at the first election for charter officers to be held after the passage hereof, which election shall take place on the first Tuesday in December, 1857. All persons who shall have been elected under former laws regulating or affecting the election of charter officers, and shall be in office at the time of the passage of this act, shall continue in office until the officers elected under this act shall take their office, and no longer, except that the offices of commissioners of repairs and supplies, and of commissioners of streets and lamps are hereby abolished, and except that the persons now filling the several offices of comptroller, counsel to the corporation, street commissioner and city inspector, and the officers of the Croton aqueduct department shall continue in office until the expiration of their several terms, and shall not be removed from office during such ordinance, except for the cause and in the manner provided for in sections 20 and 49 of this act; and all other charter officers and all school officers, and each governor of the almshouse, whose terms of office may expire with the present municipal year, shall also be elected on the day before provided for by this section."

VI. At the death of Mr. Taylor, on the 9th of June, the office which he held was held solely under the new charter. The old charters under which he had been elected were all repealed. He could exercise no authority under them. His power was derived solely from the new act, and this act made him a street commissioner, and his office a statutory office, to expire on the 1st of January, 1860. In truth, there is not a single city office now held under the authority of the old charters from 1830 to 1857. Every officer, high or low, must justify his acts by the new charter, or he cannot justify them at all.

VII. It follows clearly from these considerations that the

present mayor cannot appoint or remove any head of a department until 1858, and that the mayor then elected cannot appoint or remove a street commissioner, city inspector, or officer of the Croton aqueduct department, till the expiration of the terms for which they were elected under the old charters.

VIII. The notion that the mayor has now the power to fill the vacancy by virtue of the old ordinances has no support. (1.) The language of section 32 is limited and guarded. It is that "until the common council shall otherwise direct, the existing ordinances shall apply to the departments herein mentioned, so far as the same are applicable thereto, and are not inconsistent with this act." The words "apply to the departments herein mentioned," do not mean that they shall determine who are to hold the departments, or how they are to be appointed, but how they shall exercise their functions when appointed. (2.) The old ordinances are inconsistent with the new charter in this respect—that the latter takes from the mayor all right of control over, or interference with the street commissioner's office till 1860, while the former gave it to him in certain contingencies. (3.) The words "until the common council shall otherwise direct," suppose that the common council has control over the subject of the ordinances, and reserve to the common council the right to continue them, to re-enact them, to alter them, or to repeal them. It was clearly not intended to give to the ordinances any extraordinary authority, but to prevent the confusion which might arise before new ordinances on the same subject could be passed. What the common council could not now ordain, is not retained as an ordinance of the past. (4.) The ordinance of 1849 on the subject of vacancies in the street commissioner's department is but a repetition of the act of 1849, and copied with the ordinance for convenience, just as parts of the constitution of our state are copied into the revised statutes. But they derive no force from being thus copied; and, when the original from which they were copied falls, the copy falls with it. The charter of 1849 is specially repealed by the present charter. It would seem then most natural to conclude that the legislature has retained, by copying, the ordinance, while it has in

tended to repeal the original statute, and has manifested such intention in the most pointed language.

Fourth. By refusing to decide upon the sufficiency of Mr. Conover's bond, the mayor did not defeat his right to take possession of the papers of the street commissioner's office.

I. The commission issued by the governor in the name of the people, under the great seal of the state, constituted Mr. Conover the successor of Mr. Taylor, and thus brought him within the terms of the act under which this application is made.

II. No question is made regarding Mr. Conover's oath of office. If there had been, it would have been unavailing, for his oath was duly taken and duly filed. (*Const. art.* 12. 1 *R. S.* § 22. *New Charter*, § 39.)

III. The objection as to the bond, if it can be considered at all, amounts to this, that because the mayor did not examine it, and so did not approve it, it is insufficient. The first answer to the objection is, that there is no statute which prescribes what security is to be given, or by whom executed, or by whom approved. The only statute referring to the subject is the new charter, which in sections 30 and 45 declares that the common council shall require from all disbursing officers sufficient security, which shall be annually renewed. Until the common council act, by ordinance passed after this charter, no security can be required from the street commissioner; and the law, 1 *R. S.* 120, § 25, which declares that "when any officer is required by law to execute any official bond, he shall cause the same to be filed in the proper office within the time prescribed for filing his oath of office, does not apply to this office." In the sense of this statute Mr. Conover was not required to execute an official bond.

IV. If, however, a new ordinance was not necessary, and the old ordinances might be resorted to, by force of section 32, "so far as the same are applicable," and "not inconsistent" with the new charter, the ordinance of 1849, the only one upon the subject, is inconsistent with the new act. The words of the ordinance are that "The street commissioner, before entering upon the duties of his office, shall execute a bond to the corporation with at least two sureties, to be approved by the mayor and filed

in the office of the comptroller, in the penal sum of $10,000, conditioned for the faithful performance of the duties of his office." This ordinance contemplates one bond for the whole official term—the new charter requires an annual bond.

V. If, however, the old ordinance were not inconsistent with the new act, and were applicable to the office in question, it must be deemed unreasonable and void. All by-laws or ordinances of corporations must be reasonable. (*Ang. & Ames on Corp.* §§ 347, 357. *Davis* v. *Mayor, in the Superior Court.*) This by-law is not only unreasonable but positively unlawful. If it be valid, the common council can nullify any appointment of the governor. This very ordinance would enable the mayor to prevent an appointee of the governor from ever executing the office. A mandamus to the mayor would do no good; for although it might require him to decide upon the sufficiency of the sureties, it could not require him to approve them. If this ordinance be valid, the common council might pass one that the street commissioner appointed by the governor, before entering upon the duties of his office, should execute a bond approved by the common council, or by the former deputy street commissioner, or by any other person whom the common council should designate, and in that way defeat the appointment and obstruct the execution of the law. The ordinance made the law inoperative, and must, therefore, be illegal.

VI. But if the ordinances of 1849 be in force, be applicable, be consistent with the new act, and be in all respects legal and valid, it does not create a condition precedent to the right of Mr. Conover to have the books and papers of the office. It is directory upon the officer, and at most amounts to a condition subsequent. So the revised statutes expressly provide in respect to all cases of this kind. (1 *R. S.* 121, § 31.) "If any person shall execute any of the duties or functions of any office without having executed and filed in the proper office any bond required by law, he shall forfeit the office," &c.

VII. If the execution and filing of the bond were a condition precedent, the approval of the bond is not so. The language of the section of the revised statutes just quoted, is, "without hav-

ing executed and filed" the bond required by law The bond required by law has been executed and filed. The certificate of the mayor's approval would be only evidence of its sufficiency, which is abundantly proved by other evidence. Without such certificate the bond is valid and binding on Mr. Conover and his sureties. Suppose, however, the bond approved by the mayor be a condition precedent, the performance of that condition has been prevented by the mayor, who, in this respect, is the agent of the state; and the performance of any condition is excused if it be prevented by the act of the sovereign imposing this condition, or any of his agents or servants. To this point there are numerous authorities. (*The People* v. *Manning & Condit*, 8 *Cowen*, 297. *Carpenter* v. *Stevens*, 12 *Wend.* 589. *The People* v. *Bartlett*, 3 *Hill*, 570.)

VIII. The conduct of the mayor was fraudulent and contumacious. He is the party who seeks to defeat a rightful appointment by the governor. To nullify the appointment and obstruct the operation of the law, he refuses to examine the bond, that he may gain time; he keeps out Mr. Conover by force, and puts an intruder in his place, seeking thus to retain possession of the office and its patronage by an incumbent *de facto*, who cannot be ousted by the ordinary action of *quo warranto*, till the autumnal elections are over. To allow such conduct to succeed, would be to bestow a premium upon fraud and violence. If Mr. Conover's appointment were legal, no language can be too harsh for the conduct of the mayor. And this question of the sufficiency of the bond must be examined on the assumption that the governor had the power to appoint, and the mayor had none. Looking at the mayor's conduct in this point of view, it was as bad as it should be unavailing.

IX. But if every one of our previous positions upon this head are untenable, the objection that there was an insufficient bond, or no bond at all, would still be unavailing to Mr. Devlin because no party but the state can take advantage of a failure of an officer to file his official bond. In a *quo warranto* against Mr. Conover the state could urge that objection, and in no other proceeding could it be urged, and when urged in that way it

would be a sufficient answer on the part of Mr. Conover that he had done every thing on his part required, and that the only delinquency was a grave delinquency on the part of an officer, agent, or servant of the state. (*Matter of Mohawk and Hud. R. R. Co.*, 19 *Wend.* 142. *Matter of Chenango Co. Fire Ins. Co.*, *Id.* 636. *People* v. *Fisher*, 24 *id.* 215. *Greenleaf* v. *Law*, 4 *Denio*, 170. *Weeks* v. *Ellis*, 2 *Barb.* 320. *U. S. Bank* v. *Dandridge*, 12 *Wheat.* 64. *Angell & Ames on Corp.* § 285. *Tupper* v. *Newton*, 25 *Eng. L. and Eq. Rep.* 336. *McNutt* v. *Lancaster*, 9 *S. & M.* 587. *Hastings* v. *Turnpike Co.*, 9 *Pick.* 80. *Bac. Abr. tit. Offices and Officers.*) "If an officer be created by letters patent, he is a complete officer before he is sworn or before any investiture."

PEABODY, J. The exact function devolved on me by the statute under which I am called to act, being ascertained, much of the difficulty of deciding the case before me will, I think, be overcome. To this inquiry, then, I will direct my attention first.

The section of the statute (1 *R. S.* 125, § 56) provides, in effect, that if a person elected to an office die, and any books or papers appertaining to the office shall come to the hands of any person, the successor to the office may adopt this proceeding to get possession of those books and papers. This is a very brief statement of the substance of that section, as far as it is applicable to this case. A person has been elected to the office of street commissioner of the city of New York. That person has died, and books and papers belonging or appertaining to that office, have come to the hands of a person (the respondent.) Thus far the case before me comes within the statute. These facts are not seriously controverted, and these having occurred, a certain person, or rather a person sustaining a certain character, is authorized to adopt this proceeding before me. "The successor to such office may," and he alone of all the world may, through this statute, invoke my aid in this proceeding to obtain possession of such books or papers. The applicant says he is the successor of the deceased to that office, and he pro-

duces what he claims is evidence of his title, to wit, a commission showing his appointment to the office by the governor of the state. The effect of this is a matter of controversy between the parties. The applicant asserts that it confers on him the office, and the respondent denies that it does this, and the power of the governor to fill the office by appointment is at once in issue between the parties. On the decision of that question must the ultimate rights of the parties to this proceeding mainly depend.

The respondent claims the office by virtue of an appointment from a different source—the mayor, with consent of the board of aldermen—but his title is not necessarily to be examined here; for if the applicant's claim is good, the respondent's is, of course, bad; and if the applicant's is bad, it is not important to examine that of the respondent, for this proceeding can only be maintained on the strength of the applicant's claim. If, therefore, the applicant's claim be not well founded, he must fail, and the relief sought here must be denied, even though the claim of the respondent should seem to be equally defective.

The only question, then, of all those raised and discussed on the argument of this case, which I need to decide, is whether the applicant is the successor to the office of street commissioner. The power of the governor to make the appointment depends entirely on the act of February 3, 1849, which provides that "whenever vacancies shall exist, or shall occur, in any of the offices of this state, where no provision is now made by law for filling the same, the governor shall appoint some suitable person, who may be eligible to the office so vacant, or to become vacant, until the commencement of the political year next succeeding the first annual election after the happening of the vacancy, at which such officer could be by law elected." An objection was made on the argument, that this statute did not apply to this office, this being a city and not a state office. I think it is a city office; that is, that it belongs to the class called city, as distinguished from the classes called county, town, village or state offices; but these denominations are used to

distinguish the several classes of offices from each other, for purposes of convenience chiefly, and perhaps wholly; and the fact that an office comes within the class denominated county, village or city offices, as distinguished from those usually known by the more generic name of state offices, does not prove, or tend to prove, that it is not in fact a state office; or, in the language of the act, not one "of the offices of this state." On the contrary, city, county, town and village offices are all of them offices of this state, in the more general and comprehensive sense in which the language of this statute is evidently used, and this, though a city office, is nevertheless an "office of this state," and embraced in the terms of this statute.

This statute was passed to carry out a provision of the constitution (*Art.* 10, § 5) which directs, in most general terms, that "the legislature shall provide for filling vacancies in office;" and neither the constitution, in using the terms "vacancies in office," nor the statute, in using the terms "vacancies in any of the offices of this state," seems to look to a provision for vacancies in a particular class of offices—quite the reverse. This statute provides for filling this office, if no other provision was then ("is now") made by law for filling it. To the application of this statute to this case, several other objections besides this are made by the respondent.

First. That if it applies to city offices, it is, in a certain aspect, repugnant to the constitution, (*Art.* 10, § 2,) which provides that all city officers whose appointment is not provided for by that constitution, shall be elected by the electors of such cities, or appointed by such authorities thereof as the legislature shall designate for that purpose.

Second. That the act of February 3, 1849, cannot, from its nature, be applied to this office, it being not elective. That act provides that the appointee of the governor shall hold "until the commencement of the political year next succeeding the first annual election at which such officer could be by law elected," and, as this office is not elective, no such election can ever occur, and hence the term of office of the appointee would never expire.

Third. That the charter of 1857, (§ 32,) in continuing in force all the ordinances relative to the departments, continued in force the ordinance of 1849, which gave the power to the mayor; and in effect, by continuing the ordinance in express terms, perhaps enacted it as a statute, and gave it an effect greater than it would have had as an ordinance merely.

Fourth. That the power to appoint to such an office inheres in the city, by virtue of its general powers, without express provision on the subject.

Fifth. That there was no actual vacancy to be filled, Turner, the deputy, being the incumbent, by virtue of the ordinance to that effect, on the death of the former incumbent.

I do not attempt to enumerate all the objections raised by the respondent. Some of them certainly do great credit to the ingenuity and skill of counsel, as do the arguments on both sides of this case, to those who participated in them, respectively. I merely state some of the points to show that there is a question to be tried; and although it may seem to me not difficult to decide where the appointing power is by law vested, I think that a reasonable question of title to the office exists, and that such a question is not proper to be tried in this proceeding.

It was never intended by the legislature to authorize a justice of this court, sitting here, to decide in effect the title to an office. If there is a reasonable doubt as to who is entitled, it should be decided in a direct proceeding for the purpose, an action of *quo warranto*, which is with us the substitute for the old writ of that name. This is a proceeding to get present possession merely of the books and papers incident to an office, not of the office itself, and it should not be allowed to answer that end practically, which it would do if the books and papers necessary to the functions of an office are to be awarded a party on his merely showing a title to the office itself. In these views I find myself sustained by authority, and among others by the case of *The People* v. *Stevens*, (5 *Hill*, 616,) and the opinion of Judge Kent, reported at page 631 of the same volume, and that of Justice Edmonds, *In the matter of Whiting*, (2

Barb. S. C. R. 513.) I am inclined, however, to go further than these cases, and to limit the application of this proceeding to cases of possession merely. My own view of this statute is, that the question of title to the office should not be allowed to be tried in it at all; that the abstract right of an applicant is unimportant, where possession is clearly shown; that it should not be inquired into at all, further than, perhaps, to see that if in possession he has color of title; that being in the office under color of right, he should have this proceeding to get the books and papers; and, on the other hand, that having the best possible right to an office, one should not have the possession of the books and papers by this proceeding, while it is apparent he is not in the occupancy of office, and not in a situation to exercise the functions of it.

This whole proceeding is on the idea that the applicant has succeeded to the office—that he is, in fact, "the successor to such office"—that he is in the office, and needs the books and papers as means or instruments with which to perform the duties of it. They are incident to the office, and should attend it ever—should attend the possession and exercise of it, not the mere right to it, however clear, if it appear that the right is not accompanied by actual incumbency of it, and that therefore the possession of them would not enable him to discharge the duties of the office.

The possession of them, as the means of exercising the functions of the office, is indispensable to the officer and the public; and the object of this statute is to put them into possession of the actual incumbent for actual use for the time being, not to decide who, in the abstract, is entitled to them because he is entitled to the office to which they pertain. The title to them must ultimately depend on the title to the office, and so I think should the right to present possession depend on the fact of present possession of the office to which they are appurtenant. I doubt much whether a party not in possession of an office, and therefore not in a condition to exercise the functions, should in any case have the possession of the books and papers of it awarded to him in this summary manner, even

if his title to it were perfect; and I am inclined to think, on the other hand, that a party in an office with color of title, and performing the duties of it, should have them. The acts of an officer *de facto* are valid in law; and the policy of the law is, that the actual incumbent of an office shall perform the duties of it for the time being; that the functions of an office shall not cease or be suspended because of a doubt about the title of an incumbent; and hence it is the policy of the law, and of this statute as a part of the system, that the incumbent shall have, at all times, the means of performing these duties—the books and papers, as well as the other means.

This statute is for the actual incumbent—the actual "successor to such office"—rather than the person entitled to succeed to it. It is apparent to my mind, that it is not intended for the party entitled, merely because he is so entitled. The only proper mode for a person entitled to an office, but not in possession of it, to assert his title, is by the action of *quo warranto*. In that action his title may be established judicially, and possession acquired, and this being done, he is in a condition to avail himself of this proceeding to get possession of the books and papers incident to the office. He is in a condition to use them, and his adversary, being ousted, is not in such a condition. They in that case accompany, as I think they should always, the possession and user of the franchise.

From what has been said above, it is apparent that the result of this proceeding with me must depend chiefly on the question of possession of the office by the applicant. Was he ever in possession of it? What is the evidence on that subject? It is proved that he received a commission; that he made and filed with the proper officer the oath of office; that he made the proper bond and filed it with the proper officer; that he went into the department devoted to the transaction of the business of the office, containing the books, papers and paraphernalia of the office, claiming to be street commissioner and the head of the office, exhibited his commission and proofs of his title, asserted his title and authority over the business, clerks and employees of the establishment, assumed for himself

a seat and desk for the transaction of business, and announced himself ready for official business, and actually performed an official act, in granting a permit for some purpose. He remained there through the day, to the hour of closing the office, and returned thither the next morning, renewing all his claims and resuming his place at his desk for the transaction of business, and continued to occupy the place, under his claim of office, until removed thence by force, late in that day. The next day he returned and repeated all his claims, in language and acts, and remained there until he was again ejected by force, and assured by the man taking the lead in his expulsion, that his presence there would not be tolerated, and that all efforts to remain there would therefore be unavailing. He did all he could do toward assuming possession of the office, and claimed to be in it by virtue of his appointment. To be sure, Turner, the deputy commissioner, did not yield to him possession of the books and papers, but refused to do so, under the instructions of the mayor to that effect, and continued himself to transact the business of the office as such deputy; and Bennett, by force, ejected him from the apartments; but neither of these acts of the mayor, Turner or Bennett can affect the rights of the applicant. They had no office to dispense, no judgment to pronounce on the claim of the applicant; had no power in the premises by doing or withholding any action to create or change any rights of the applicant, and their withholding or yielding their recognition or assent to his claims could not affect any increase or diminution of those rights. The office was vacant from the death of Taylor. Turner merely had power to act as street commissioner in case of a vacancy. (*Corp. Ord. ed. of* 1856, *p.* 52, § 234.) "In case of vacancy * * * the deputy shall act as street commissioner until the vacancy shall be supplied by a new appointment." This did not make him street commissioner. It certainly did not fill the office so that no vacancy remained to be filled. There is no foundation for such a claim. If he (as the argument was) filled the vacancy, what vacancy, in the language of the ordinance, remained to "be supplied by a new appointment?" There is nothing to suggest such an idea, and the

very language of the ordinance under which the claim is made, so far from authorizing, excludes it. The possession of this property of the office thus withheld from him was not at all essential to his possession of the office or franchise itself; and whether this assertion of authority over it which he lacked the physical force to maintain, be deemed in law as amounting to possession or not, is not important. He was not the more street commissioner if he had, or the less so if he had not, that possession of the property. It seems hardly necessary to add that whatever were his relations or rights to the office, or the property pertaining to it, the forcible removal of him against his will from the rooms occupied for the transaction of the business of this office, and from the presence of the property pertaining to it, cannot affect them. His rights are the same as if he had remained undisturbed, and had continued without interruption the course he attempted to pursue. The office was vacant, and he, with claim and color of title, entered it, and assumed the franchise. There is no pretense that he has resigned or forfeited any right he thus acquired. It follows that he is now in possession of those rights. He is therefore now street commissioner *de facto*. His title to the office may be tested in the proper proceeding; but, as was strenuously insisted by the respondent, on the argument, the title of one in possession under color of title cannot be tried here. For the purpose of this proceeding, possession with color of title is sufficient. It is said that he was not in the office, because his bond was not approved by the mayor. This is one of the questions to be tried in the suit for testing the title to the office, and must be referred to that forum. It is replied to this question, among other things: 1. That no bond is required by law. 2. That the approval, being merely a mode of determining its sufficiency, is not indispensable, the sufficiency being shown otherwise. 3. That the efforts of the applicant to get the approval of the mayor, and his refusal to attend to it, excuse the omission, even if it were otherwise necessary. 4. That if an approval was necessary, and nothing had been done to excuse the want of it, still the applicant was in possession, even if the entry without the approval was wrongful.

Here are several grave questions arising, by no means free from difficulty, and not at all proper to be tried here. He claimed to be in the office. He claimed, also, to have complied with all the legal conditions of the appointment, and for this he shows ample color. What these conditions were, and whether they were precedent or not, and whether they had been fulfilled, and if not, whether the fulfillment is excused by the facts urged to that end; and if not excused, what the effect of non-fulfillment is to be, are all questions fairly arising on the facts in this case, and to be considered whenever the question of title shall be fundamentally decided. They cannot be properly examined in this informal and summary proceeding. The fact of actual possession does not necessarily depend on the decision of that, and, as I have before intimated, wherever the fact of the possession of an office can be discerned, as in some cases it can easily, and in others, like this, only with great difficulty and very indistinctly, this fact, fortified by color of title, should direct the course of the books and papers. At the time he assumed the office the vacancy in it was undisputed. No one even claimed to be in it. The title of Mr. Devlin, whatever it may be confessedly, had its origin some days afterward. His appointment bears date several days after that on which the applicant assumed possession by virtue of his appointment, and after his removal by force, not from the office, for an unauthorized force could not divest him of possession of the franchise, but from the rooms and property dedicated to the uses of it, in the discharge of its functions by the incumbent. The rights of Conover, acquired by prior possession, can only be divested by legal measures. These measures have not been applied, and his rights remain. Being in possession, he was the officer *de facto*, and will continue to be, until ejected, which can only be done by process of law. He has all the rights incident to possession, and with color of title. My conclusions are, that Conover entered the office and took possession; that he has not been removed by legal warrant or authority, or left it himself, and consequently that he is still in and for this purpose entitled to possession; and consequently, that the respondent, as the

office can have but one incumbent, is not legally in possession It follows that Conover is entitled to possession of the books and papers, and to have them delivered to him under this proceeding.

[New York Special Term, July 8, 1857. *Peabody*, Justice.]

Travis *vs.* Barger.

24 614
38 416
49 107

Where, upon the trial of a cause, objectionable testimony is given, in answer to a question which is not objected to, and which does not necessarily call for any such evidence, and the judge immediately declares the testimony inadmissible, and in his charge to the jury directs them to disregard it, the giving of such testimony affords no ground for granting a new trial.

In an action by a father, for the seduction of his daughter, an agreement in writing between the defendant and the daughter, by which the defendant admits the seduction, and agrees to pay her a sum of money, and the daughter releases and discharges him from all actions for damages, and claims of every kind, is admissible in evidence, not for the purpose of showing the extent of the injury which the defendant has inflicted on the plaintiff, or the amount of damages to which the latter is entitled, but as an admission by the defendant of the facts necessary to be proved by the plaintiff, in order to maintain the action. S. B. Strong, J., dissented.

Where matters offered in evidence by the defendant furnish a complete bar to the plaintiff's action, they must be pleaded. If, however, instead of being a complete defense, they go only to the extent of his recovery—to the amount of his damages—they may be given in evidence without having been pleaded.

An action cannot be maintained, by a father, for the seduction of his daughter, if his own wrongful act, or omission, co-operated with the misconduct of the defendant, to produce the damages sustained.

Proof that the plaintiff knew of the improper intercourse between his daughter and the defendant, when it took place, and did not interfere to prevent it; or that he connived at the intercourse, and consented to his daughter and the defendant being together and having such intercourse, after it came to his knowledge, is a bar to an action by the father, for the seduction of his daughter, *per quod servitium amisit*.

But if those facts are not set up in the answer, as a defense, nor offered in mitigation of damages, but are offered to be proved on the ground that they will furnish a complete defense to the action, the evidence is inadmissible. S. B Strong, J., dissented.

Travis *v.* Barger.

Where evidence, offered to be given, as a defense to the action, is excluded by the judge, on the ground that it is not warranted by the pleadings, the party should offer it again, in mitigation of damages, if he wishes to avail himself of it, for that purpose.

The proper place for deciding upon the propriety of an amendment of the pleadings is at the circuit, where the parties, and their witnesses, are before the court, and where the good or ill faith of the application can be investigated. An application for leave to amend is addressed to the sound discretion of the judge; and his decision upon it will not be reversed, on a motion for a new trial, except in a clear case. There must be some proof that the defense proposed to be set up by the amendment is true, and can be sustained.

Where, in an action for seduction, the jury found a verdict for the plaintiff for $3000, the court refused to grant a new trial on the ground of excessiveness of damages.

THIS was an action brought by the plaintiff against the defendant to recover damages for the seduction of the plaintiff's daughter, Temperance S. Travis. The complaint charged that at the time of the seduction the said Temperance was the servant of the plaintiff, and further charged, on information and belief, that in the month of February, 1854, and on divers other days and times between that time and the commencement of said action, at Putnam Valley, Putnam county, the defendant, wrongfully intending to injure the plaintiff and to deprive him of the services of his said daughter and servant, debauched and carnally knew her, whereby she became pregnant and sick with child, and was afterwards, and on or about the 7th day of December, 1854, delivered of a child at the plaintiff's house at the place aforesaid, where she remained during her sickness, and was nursed and taken care of at the plaintiff's expense; by reason of which premises the plaintiff lost the services of his daughter, and necessarily expended considerable sums of money in taking care of her, whereby the plaintiff was injured and sustained damages to the amount of $5000, for which sum the plaintiff demanded judgment. The answer denied, upon information and belief, that the said daughter was at the time of the alleged seduction the servant of the plaintiff, and it further denied that with intent to injure the plaintiff, or deprive him of the services or assistance of the said Temperance, he debauched or carnally knew her at any time; and whether said Temperance became

pregnant by the defendant, the answer alleged that he, the defendant, had no knowledge or information sufficient to form a belief, but denied upon information and belief that she was nursed or taken care of at the plaintiff's expense. The answer was verified.

The cause was tried at the circuit in Putnam county, in October, 1855, before Justice BROWN, and a jury. The plaintiff's daughter, Temperance S. Travis, was examined as a witness for the plaintiff, and testified to the seduction and subsequent birth of the child, of which the defendant was the father. At the time of the seduction she was about 22 years of age, and resided at her father's house. Among other things, she testified that about a month after the last intercourse she made her condition known to the defendant; told him he had made trouble for her, and wished him to do as he said, and marry her. The defendant's counsel objected to any evidence tending to prove a promise of marriage. The judge held such evidence to be inadmissible, and stated that he should instruct the jury to disregard it. The witness testified to the execution of a paper by her and the defendant, purporting to be a "settlement and cash payment in full," between them, dated June 15, 1854, after the birth of the child. The defendant's counsel objected to this as improper and irrelevant evidence; but the judge admitted it, and the defendant excepted. This paper is sufficiently described in the opinion of the court. The plaintiff having rested, the defendant's counsel offered to prove that the plaintiff knew of this intercourse between the defendant and his daughter when it took place, and did not interfere to prevent it. Also, that he connived at the intercourse, and consented to the defendant and his daughter being together and having such intercourse, after it had come to his knowledge. This evidence was objected to, because such matters of defense were not set up in the answer, and because the defendant had not denied the seduction in his answer, and because that part of said offer which related to the offer of the defendant to marry was not proper. Objection sustained, and decision excepted to. The defendant's counsel then moved to amend the

pleadings in terms so as to permit said evidence to be received which being objected to was denied by the court. Decision excepted to. The judge then charged the jury, among other things, to disregard the evidence tending to prove a promise of marriage. The jury, after deliberation, found a verdict for the plaintiff for $3000.

The defendant subsequently made an affidavit, stating that after his answer was put in, he was informed that, at divers times, previous to his alleged connection with the plaintiff's daughter, she had had sexual intercourse with various other persons; and that the intercourse between her and the defendant was known to, encouraged and permitted by, the plaintiff. That those facts came to the defendant's knowledge only a few days before the trial, and too late to give notice of motion for an amendment of his answer. That since the trial, the defendant had learned that he could prove substantially the same facts by other witnesses than his informant, and of which facts he had no knowledge or information until since the trial. And that in case of a new trial, he expected to prove the facts embraced in the proposed amendments to his answer. Upon this affidavit the defendant moved, at a special term, for leave to amend his answer, so as to set up the above facts as a defense, and for a new trial. The following opinion was given, upon deciding that motion.

Brown, J. "This cannot be regarded as a motion for a new trial upon the ground of newly discovered evidence, because the evidence was known to the defendant before and at the time of the trial, and was in fact offered and rejected. The motion must therefore depend upon the power and duty of the court to allow an amendment to the answer, with a view to the reception of the evidence, which involves the right to a new trial.

The action is for the seduction of the plaintiff's daughter and servant. The answer put in was a denial of the sexual intercourse charged. Upon the trial the defendant offered to prove that the plaintiff connived at and consented to the intercourse; which evidence was rejected, because no such defense

was set up in the answer. It will be seen that this defense is in bar of the action, and changes the issue entirely; for while the general denial puts in issue the fact of the sexual intercourse, the evidence proposed admits the fact of the intercourse, and sets up in bar connivance and consent.

The first and most serious obstacle in the way of the defendant's motion is this: He knew of the existence of this ground of defense before the trial. It is true it was not known until after the case was noticed for trial, and too late to move for leave to amend the answer. When its existence first became known does not appear, because the defendant does not state. It was not so late, however, that the defendant could not have obtained an order to show cause, on the first day of the circuit, why the answer should not be amended upon terms just to the plaintiff. Had such an order been obtained, and sufficient grounds for the application had appeared, there cannot be a doubt but that the court would have required the plaintiff either to consent to the amendment and proceed to trial, or have postponed the trial, upon terms, to the next circuit, in the event of the plaintiff's refusal to consent to the amendment of the answer. In this form justice might have been done to all parties. But in place of this, the defendant proceeds to trial as if his pleadings were all right, offers his evidence, which his counsel knew would be rejected, takes the chance of a verdict favorable to himself, and when it turns out unfavorable, claims to amend, have a new trial, and take the chance of another jury for a more favorable verdict. Had he made an effort to postpone the trial, with a view to amend, or to be permitted to amend before the trial, and failed, he would have been in the attitude of one who had used all the diligence in his power, and his present motion would have stood on grounds of equity and justice, which it would be difficult to resist. Having omitted, either intentionally or inadvertently, to make any effort of the kind, he could not be allowed to take the chance of another trial, without the clearest injustice to the plaintiff.

I may also notice another difficulty which appears upon the face of the defendant's papers. A motion to amend a pleading and for

a new trial after verdict should not be granted, unless all doubt of the existence of the fact sought to be introduced into the pleadings is removed. There should, at least, be the affidavit of some one that the fact exists; so that the court may be sure that the facts relied upon will be made out prima facie upon the trial. In the present case there is no evidence that the defendant will be able to make out the defense of connivance, or that any such defense really exists, except the information and belief of the defendant. For any thing that appears upon the motion papers, except the hearsay of others, there is no such defense; and it may well be that if a new trial was granted and leave to amend given, no other result would follow but another jury passing upon the question of the plaintiff's damages."

The motion was, for these reasons, denied; and the defendant appealed to the general term.

Ferris & Frost, for the plaintiff.

Nelson & Coffin, for the defendant.

Birdseye, J. The evidence to which the counsel of the defendant objected as tending to prove a promise of marriage, was given in answer to a question which was not objected to, and which did not necessarily call for any such evidence. The part complained of was only a portion of a sentence, and stated a conversation between the witness and the defendant. As soon as the objectionable matter had been stated, the presiding judge declared it inadmissible; and he then, and also in his charge to the jury, directed them to disregard it. To make this answer of the witness the ground for granting a new trial, would render it necessary to set aside the verdict in every case where a witness for the prevailing party had stated matters not responsive to the questions put to him, and not admissible as evidence in the cause.

The only other objection to the evidence, taken at the trial was to the reading of the agreement of June 15th, 1854, between the defendant and the plaintiff's daughter, for the seduction

of whom the action was brought. The seduction had taken place in the month of February previous. The defendant was informed of the pregnancy of the witness, in the month of March or April. In June he called at the plaintiff's residence, and saw the witness, in the absence of her parents. He then induced her to sign the agreement in question, he executing it at the same time. By this agreement, after reciting that the parties had disagreed in one point only, it was agreed to settle that point and all other matters of difficulties, accounts, &c., actions of or for damages or claims for damages of any kind, promises or breaches of promises of any and all kinds whatsoever, which had any foundation previous to the date of the agreement and settlement. The agreement then contains a discharge by the plaintiff's daughter to the defendant "from all actions in law, equity or otherwise, as above named or alluded to, *for either legitimacy or illegitimacy.*"

The defendant induced the daughter to sign this paper, which she did not read, by assuring her he had brought it there to show her father that he, the defendant, intended to do as he had said; and when urged to do as he had said, he replied that he intended to do so, but that he had a house to fix, so that they would have somewhere to go. After the paper had been signed by the parties to it, the defendant induced the plaintiff's son to sign it as a subscribing witness, by falsely representing it to be *his will.*

The defendant, by his answer, had traversed the allegations of the complaint as to his debauching and carnally knowing the plaintiff's daughter, and as to her becoming pregnant by him. The proof of each of those facts was essential to the maintenance of the plaintiff's action. The defendant had entered into a written agreement with the plaintiff's daughter, whom he thus denies he had seduced, by which she, at his request, released him from all actions, either for legitimacy or *illegitimacy.*

As the evidence of the person seduced is always more or less open to suspicion, or criticism, in actions like the present, I think that where the defendant chooses to furnish proof, under his own hand, of the truth of the charge against him, it is ad-

missible in evidence; not for the purpose of showing the extent of the injury which he had inflicted upon the plaintiff, or the amount of the damages to which the plaintiff was thereby entitled. If there were no other grounds than these for receiving this evidence, I do not see how this verdict can stand. But the proof, in my opinion, went to sustain the plaintiff's right of action itself. Taking the whole paper together, it seems to be an admission by the defendant, over his own signature, of the very facts which he has denied in his answer, and which the plaintiff was required to prove, to entitle himself to a recovery. That such proof was cumulative; that the same facts had been already established by the plaintiff, when this agreement was read to the jury, did not render the evidence incompetent. Nor can the defendant complain, if this proof, competent for another purpose, was of such a character that a jury might naturally deem it rather an aggravation of his offense. The evidence of the defendant's acts and representations in respect to this agreement was received at the trial without objection, and was not complained of at the argument before us, and cannot properly form any reason for granting a new trial.

After the plaintiff had rested his cause, the defendant made two offers of proof, which were objected to and excluded. It is upon these rulings that the principal question in the case arises. The first offer was to prove that the plaintiff *knew* of the intercourse between his daughter and the defendant, *when it took place, and did not interfere to prevent it.* The other offer was to prove that the plaintiff connived at the intercourse, and consented to the defendant and his daughter being together and having such intercourse, after it had come to his knowledge. These offers were made, it is clearly apparent, upon the ground that the proof would furnish a complete defense to the action, and not merely that it was admissible in mitigation of damages. The judge decided upon the question which was thus presented to him. If he was in error, there must be a new trial. But if he committed no error, it is difficult to see what ground of complaint the defendant has. He attempted

to sustain by evidence a defense which the pleadings did no warrant. The court excluded the proof, to make out this defense; and rightly so. Instead of offering it again for the purpose of mitigating the damages, for which purpose alone it is now contended it was admissible, instead of presenting to the judge the point upon which alone it is now contended that he erred, and calling his attention specifically to it, so that it might have been passed upon, the defendant chose to let the case be submitted to the jury. And he now raises the question in such a manner that, if successful, he has a chance with another jury, although there was no error committed at the former trial, either in the admission of testimony or the decisions of the court. Such a course ought not to be permitted. It is likely to put the court in a false position, and to work injustice to the opposite party. The party complaining of the charge of the judge, which is claimed to be erroneous in part only, and in part correct, is required to call attention specifically to the matter complained of, so that the error, if any, may be forthwith corrected. The same principle, in my opinion, applies in a case like the present.

But I think that if the proof had been offered merely in mitigation of damages, it would have been properly excluded; and that no error, therefore, happened at the trial, even if we are at liberty to give to the offers actually made, a construction so liberal as to hold that they did present this question distinctly for decision.

It will not be seriously contended, I imagine, that if the defendant has matters of defense which constitute a complete bar to the action, he may abstain from pleading them, keep them from the knowledge of the plaintiff till he has rested his case, and then prove those facts, and thus reduce the damages to sixpence, while his opponent is practically deprived of all opportunity to controvert that which has in effect defeated his recovery, and left him to pay his own costs. And yet, if I understand the counsel for the defendant, this is the direct and necessary result of his argument. If it be the rule of law, I have yet to learn it. Certainly, it is not established in

the learned and able opinion of Mr. Justice Selden, in *Bush* v *Prosser*, (1 *Kern.* 361, 365,) which is the only authority cited for the position.

I take the rule to be this: where the matters offered in evidence by the defendant furnish a complete bar to the plaintiff's action, they must be pleaded. If, however, instead of being a complete defense, they go only to the extent of his recovery—to the amount of his damages—they may be given in evidence without having been pleaded. For the rules of pleading did not allow them to be spread upon the record. It is only of such matters that Mr. Justice Selden was speaking in the opinion above referred to. That was an action for slander. And in such an action the legislature had interfered, by express enactment, (*Code*, § 165,) to allow mitigating circumstances to be set up, by way of defense, in the answer. The question is then presented, whether the matters embraced in these two offers did or did not constitute a complete defense to the plaintiff's action; or whether, admitting them to be true, the plaintiff was still entitled to recover something, but a smaller sum, owing to these matters.

The case of *Seagar* v. *Sligerland*, (2 *Caines*, 219,) was precisely like the present one. But it appeared, upon the plaintiff's own testimony, that he and his wife knew their daughter and the defendant had slept together at their house, without forbidding or discountenancing the intercourse. The court said that the plaintiff should have been nonsuited; and that there ought to have been a verdict for the defendant. That in actions of this nature, the daughter is supposed to be violated with force, against the will and consent of the father; and it is then, and then only, that he is entitled to compensation for the loss of her services. But when he consents, or connives at the criminal intercourse, he seeks, with a very ill grace, a retribution in damages. The court also say that parents who countenanced, or took no pains to abolish, at least within their own walls, a practice so indecorous and dangerous as had been proved in that case, had no right to complain, or to ask satisfaction for consequences which must so naturally follow from

it. And it was held that, in such a case, no damages at all could be given, and that the action could not be maintained.

The same rule, in substance, was repeated in *Akerley* v. *Haines*, (*id.* 292,) except that it is clearly implied there, that connivance would prevent the plaintiff from recovering, as well for the expenses of confinement as for the loss of service. (*See also Fletcher* v. *Randall*, *Anthon's N. P.* 267.) Lord Kenyon acted on the same rule in *Reddie* v. *Scoolt*, (1 *Peake*, 240.) And the rule itself is adopted in 2 *Greenl. Ev.* § 578, where such evidence is said to be a bar of the action.

In the action for a criminal conversation, which is kindred to the present one, in its main features, (5 *Cowen*, 120,) the same principle has long been applied; although there is one loose nisi prius case, (*Cibber* v. *Sloper*, *Buller's N. P.* 27,) in 1756, where the action was held to lie, though the privity and consent of the husband, to the defendant's connection with his wife, were clearly proved. (*See Selwyn's N. P.* 9, *note* 4, *4th ed.*) But it is now uniformly held to be essentially necessary that the plaintiff should present himself in court with clean hands, that is, without any imputation of having courted his own dishonor, or having been instrumental to his own disgrace; and if the husband has consented to, or provided means for, the adulterous intercourse, the ground of the action is removed.

In *Duberley* v. *Gunning*, (4 *T. R.* 651,) Lord Kenyon had charged the jury that if the husband had consented to the infidelity of his wife, it took away altogether the ground of his action, and they should find a verdict for the defendant; but if the plaintiff had not gone to that length, yet had been guilty of gross negligence or inattention to her conduct, with respect to the defendant, that would go far in mitigation of damages. The jury found for the plaintiff, with £5000 damages. All the judges held the charge to be correct. And in this view all the authorities agree. (*See Selwyn's N. P.* 8, 9; 2 *Greenl. Ev.* § 51; 1 *Stephen's N. P.* 9, *and the cases cited in these several books.*)

The rule cannot be better stated than it is by Greenleaf: "*Passive sufferance or connivance* of the husband, may be

shown in bar. But mere negligence, inattention, confidence or dullness of apprehension, are not sufficient for this purpose; there must be passive acquiescence and consent, with the intention and in the expectation that guilt will follow." (2 *Greenl. Ev.* § 51.)

In my opinion, these principles are as just and true, and as properly applicable to the present action, as if the plaintiff had been suing for an adultery with his wife. It is admitted, I understand, that they do apply to this action, so far as the plaintiff seeks to recover compensation for his loss of the comfort of the society of a virtuous daughter, and for the injury to his feelings by reason of her degradation and the consequent disgrace of himself and family. But if the plaintiff, by his own wrongful conduct, has so far brought about the act for which he sues, as to be precluded from recovering damages of one sort, how can he recover those of another? He obtains damages by reason of the loss of service, or the expenses of the lying-in, because they are the direct, natural result of the wrongful acts of the defendant. For the same reason, and solely upon the same ground, he is allowed to recover for the injury to his feelings. The one is not more the result of the defendant's illegal acts than the other. Such complicity by the plaintiff, in the defendant's wrong doing, as will bar a part of the damages properly recoverable, will bar all damages. If the plaintiff knew of the criminal intercourse of the defendant with his daughter, and consented to it, or did not interfere to prevent it, he must have known as well that sickness and expense and loss of service would result from it, as that public disgrace would follow. As Lord Kenyon said, in *Duberley* v. *Gunning*, if such a man could recover a verdict, the very source and first principles of justice would have been contaminated. It may be a new application of the familiar principle, but I believe it is a proper and just one, to say that no party can ever maintain an action like the present, if his own wrongful act or omission co-operated with the misconduct of the defendant, to produce the damages sustained.

It is only necessary to compare the offers made by the defendant, with the rule above stated, to see that they were

properly overruled. The first offer was to show that the plaintiff *knew* of the criminal intercourse between the defendant and his daughter, *when it took place*, and did not interfere to prevent it. I can hardly imagine a more direct and express consent to the criminal act than is involved in this offer. If it differs, in a moral point of view, from the acts of the procurer, I cannot perceive the distinction. The other offer was to prove the plaintiff's connivance at the intercourse, and his consent that it should continue, after it had come to his knowledge.

Both these offers seem to me to be offers merely to show that the plaintiff's action arose *ex turpi causa;* from such a violation by the plaintiff of every principle of purity and sound morals, that no court could sustain the suit, without sanctioning the vice. For if such conduct of the parent did not amount to vice itself, there is no such thing as being accessory to crime. To say that such evidence as this is not of a character which would bar a recovery, but that it was only admissible to induce the jury to assess the damages in shillings or pence, instead of dollars or hundreds of dollars, is to overlook all substance and principle, and to administer justice upon distinctions subtler than those of the schoolmen. For my own part, if these offers were true, I would say, with Chief Justice Wilmot, "No such polluted hand shall touch the pure fountains of justice." (2 *Wilson*, 350.)

After these offers of the defendant had been overruled, the defendant's counsel moved for leave to amend the pleadings so as to permit the evidence objected to to be received, which being objected to, was denied by the court. To which decision the defendant excepted. This offer, it may be remarked, shows that, at the circuit, the counsel for the defendant did not take the unsound position now assumed, that the evidence offered was admissible to mitigate the damages.

The application for leave to amend is addressed to the sound discretion of the court. That the exercise of that discretion at the circuit is not subject to review here, is more than I am willing to admit. But before we should reverse the action of the judge at the circuit, whether he allowed or refused the amendment, much more must be shown than this case presents.

The proper place for deciding upon the propriety of an amendment is at the circuit, where the parties and their witnesses are before the court, and where the good or ill faith of the application can be investigated. That investigation we have here no means of making. One fact which does appear in the case, however, is singular, and to my mind is conclusive upon this question. When the plaintiff rested, the defendant, instead of proceeding in the ordinary way to open his case and call his witnesses to the stand and elicit their testimony, made his general offers above adverted to. When they were rejected, instead of offering to show gross negligence or inattention by the plaintiff to the morals or conduct of his daughter, which proof would doubtless have reduced the damages very much, the defendant, after this unsuccessful effort to amend, suffered the case to go to the jury. The judge may have been, and I presume was, satisfied that the offer was merely intended to produce an effect upon the minds of the jury, and that the defendant was not acting in good faith either towards the court and jury, or towards his own counsel, or the plaintiff, and had no witness to sustain any part of his sweeping offers. He does not now produce the affidavit, or even give the name, of a single witness who, if a new trial and leave to amend his answer are allowed him, will testify to a single fact in support of the defense. Certainly, the party who seeks to overturn a verdict against him in this manner, ought to make it appear beyond cavil that he is not merely playing a trick upon the court.

For these reasons, I think the learned judge who tried the cause rightly denied the motion made before him at special term.

The defendant's counsel contended, with much zeal, that, considering the situation and rank of the parties, the damages were excessive, and therefore a new trial should be granted. He did not, however, refer us to a single instance where the court had ever thus interfered in favor of the seducer in an action *per quod*. Judges have often intimated, however, in actions for adultery, that they would interfere, if a case properly required it. And in *Akerley* v. *Haines*, (2 *Caines*, 293,) there is

an intimation that the same might be done in this class of actions. In the case of *Duberley* v. *Gunning*, (*ubi supra*,) the jury had found a verdict for the plaintiff for £5000 sterling. There was such evidence of the husband's connivance, that Mr. Justice Buller was for setting the verdict aside as clearly against evidence on that point; and he thought the damages so excessive that there should be a new trial. Lord Kenyon thought the damages a great deal too much; nay, he said he would have been satisfied if only nominal damages had been given. Ashurst, J. thought the verdict was properly given for the plaintiff. And Grose, J. could not say that the jury had done wrong in finding for the plaintiff. Yet all three declined to interfere with the verdict then before them, though distinctly admitting that the damages were enormous. The reasons upon which they based their judgment seem to me unanswerable, and decisive of this case. Lord Kenyon said he had not courage enough to make the first precedent of granting new trials under circumstances such as were then before him. But only the next year, in *Jones* v. *Sparrow*, (5 *T. R.* 257,) he said that the action for criminal conversation was *sui generis*, and granted a new trial for the excessiveness of the damages in an action for assault and battery, where £40 had been given for a violent beating.

In *Chambers* v. *Canfield*, (6 *East*, 244,) which was also an action for *crim. con.*, the plaintiff had a verdict for £2000. The motion for a new trial was founded on two grounds: 1st. That previous to and at time of the act of adultery proved, the plaintiff and his wife were living apart, under a deed of separation between them. 2d. That the damages were excessive, in a case where the husband had before agreed to a separation from his wife. The fact of the actual separation seems to have been admitted on all sides. (*Pages* 245, 249, 250, 253, 256.) But the court held, (*p.* 256,) upon a critical examination of the provisions of the deed of separation, that, as the actual separation was not to take place *without* the approbation of the trustees named in the deed, which was not shown, the wife was not at the time of the criminal intercourse living apart from her hus-

band by his consent, and the action would therefore lie. Upon the second ground, the court refused to disturb the verdict. Though Lord Ellenborough said, if it appeared from the amount of damages given, as compared with the facts of the case laid before jury, that the jury must have acted under the influence either of undue motives, or some gross error or misconception on the subject, the court would have thought it their duty to submit the question to the consideration of a second jury.

The correctness of the rule thus laid down, even as applied to actions like the present, I see no reason for doubting. There are many instances in our own reports of verdicts which, either relatively or absolutely, were much larger than this one; to some of which this same objection of excessiveness was taken, while to others it was not. In *Mulvehall* v. *Millward*, (1 *Kern.* 343,) the verdict was for $3000. It was not complained of as excessive. So of verdicts for $1000, in 4 *Comst.* 38, and 3 *Selden*, 191. In *Moran* v. *Dawes*, (4 *Cowen*, 412,) the plaintiff had a verdict, the amount of which is not stated. In *Graham & Wat. on New Trials*, 420, 2*d ed.*, it is said to have been for $9000. It was not alleged to have been excessive, on the motion for a new trial—the defendant's counsel on that motion being the late Chief Justice Spencer. In *Sargent* v. *Denniston*, (5 *Cowen*, 106,) the verdict was for $920. There was very strong evidence of previous criminal intercourse by the plaintiff's daughter with other men, and the plaintiff's counsel admitted that there was no seduction. One of the grounds of the motion for the new trial was the excessiveness of the damages. They were relatively far greater than they are in this case. But the court refused to meddle with the verdict for this reason, saying the damages were not so flagrantly outrageous and extravagant, as necessarily to evince intemperance, passion, partiality or corruption on the part of the jury; and that, where that is not the case, the court will not undertake to set their judgment on a question of damages, in an action of this nature, in opposition to the judgment of the jury. The authorities cited to sustain this proposition fully support it.

Although, as was said in several of the cases referred to,

I should feel better satisfied with this verdict if it were for a less amount, there is no sufficient reason for disturbing it.

The motion for a new trial must be denied, with costs.

BROWN, P. J., concurred.

S. B. STRONG, J. I think that the receipt and release, in connection with the accompanying circumstances, should not have been received in evidence. They could not have had any legitimate effect, as to the extent of the injury which had been inflicted upon the plaintiff by the seduction of his daughter, and his resulting loss of her services, or the amount of damages to which he was consequently entitled. The evidence was irrelevant; or, if it had any effect, was illegally prejudicial to the defendant.

If the action had been solely for the injury to the feelings of the plaintiff by reason of the direct degradation of his daughter, and the reflective disgrace to himself and his family, probably his alleged connivance would have been, if it had been proved, an entire defense to the action. But he sued for the expenses caused by her pregnancy and delivery, and the loss of her services. Carelessness, or even connivance by him in a course of conduct by his daughter and the defendant, which might, or might not, require such expenses, or produce such loss, would not entirely prevent a recovery against one who had been principally instrumental in effectuating the result. Such carelessness or connivance would go simply in mitigation of damages. A man who connives at the dishonor of his daughter cannot have any refined feelings, nor can her consequent disgrace subject him to any actual degradation. His only losses are such as are supposed to lie at the foundation of the action.

The rule, previous to the code, was that circumstances in mitigation of damages for torts might be given in evidence without being pleaded. It has been supposed that the code has created a change in this respect. But I do not understand that it requires that facts in mitigation of damages shall be stated in the answer in any actions, except possibly in those for

libels and slander. (§ 165.) There is a general provision in another section (§ 150) that the defendant may set forth by answer as many defenses as he shall have. But this, if compulsory, (which it probably is,) would not embrace circumstances in mitigation which do not amount to a defense. A defense, if I understand the term, is a denial, not of the amount of damages, but of the right of action. A partial defense is a denial of one or more of several causes of action. This was not formerly allowed in actions for torts, when there were several others embraced in the same count, which were either admitted or not denied. In an action where a plea of a tender might be admitted, there might have been a defense interposed to the part of a claim which was not admitted. But that was inapplicable to an action for the seduction of a daughter, where there could be no tender of amends. The provision in the code was probably designed to allow a separate defence to be interposed to each cause of action. But that, I conceive, should go to the entirety, and not simply to the extent, of the controverted claim.

The proposed testimony in mitigation of damages should, I think, have been received.

There should be a new trial; costs to abide the event of the suit.

The defendant should be permitted to amend his answer, if he elects to do so, but in that event he should pay all the plaintiff's costs since the original answer was filed.

New trial denied.

[Orange General Term, July 14, 1857. *Brown, S. B. Strong* and *Birdseye* Justices.]

BURNSIDE *vs.* WHITNEY.

24 632
21a 148

Where a submission to arbitration provided that a judgment *might* be rendered in the county court, upon the award made in pursuance of such submission; *Held*, that the party in whose favor the award was made might bring an action thereon, without entering any judgment in the county court, or waiting for a term of such court to be held.

THIS action was brought upon an award. The submission was by a writing under seal; and it was provided therein, that a judgment in the county court of Otsego county *might* be rendered upon the award made in pursuance of the submission The award was that the defendant should pay to the plaintiff $56.50, within three days after the date thereof; and it was dated the 12th day of September, 1855.

The defense set up in the answer and insisted on upon the trial was, that no judgment had been rendered upon the award, and that no term of the Otsego county court had been held after the publication of the award, before the commencement of this action thereon. The issue in the action was tried at a special term held in Otsego county in July, 1856, by Mr. Justice SHANKLAND, without a jury. He gave judgment for the plaintiff on the award, with costs. The defendant appealed from the judgment to the general term.

Benjamin Estes, for the plaintiff.

E. E. Ferry, for the defendant.

By the Court, BALCOM, J. The submission to arbitration was made by the parties pursuant to the provisions of title 14 of chapter 8, part 3 of the revised statutes, entitled, "Of arbitrations." The first section of this title provides that the parties "may, in such submission, agree that a judgment of any court of law and of record, to be designated in such instrument, *shall* be rendered upon the award made pursuant to such submission." The agreement in this case was that a judgment *might* be rendered upon the award, in the Otsego county court; not that a

judgment *should* be rendered thereon, in that court. But no technical construction of the submission is necessary to sustain this action; for it is declared in the 22d section of the title before mentioned, that "nothing contained in this title shall be construed to impair, diminish, or in any way affect the power and authority of the court of chancery over arbitrators, awards, or the parties thereto; nor to impair or affect any *action* upon any award, or upon any bond or engagement to abide by an award."

It has been held in a sister state, where the statute had been pursued in respect to the form of the submission, that the party in whose favor the award was made might elect either to enforce it under the statute or treat it as a common law award, and enforce it by action. (*Dickerson* v. *Tiner*, 4 *Blackf.* 253. *Titus* v. *Scantling*, *Id.* 89. *See* 2 *Hill*, 271.) And I am of the opinion the plaintiff in this case had the right to elect to bring this action, instead of moving for a confirmation of the award and judgment thereon, in the Otsego county court; and he was not obliged to wait until a term of the county court had intervened, before commencing his action. If the defendant had made a motion in the county court to vacate or modify the award, he could have procured a stay of the plaintiff's proceedings in this action until the decision of his motion; but he made no motion in the county court for that purpose, and he has not been deprived of any right by this action. The judgment given at the special term should be affirmed, with costs.

Decision accordingly.

[Otsego General Term, July 14, 1857. *Gray*, *Mason* and *Balcom*, Justices.]

24 634
5h 109

CLINTON and ESTES *vs.* ROWLAND.

A father is not liable for articles of clothing furnished to his minor child without his consent, in the absence of any proof that he had neglected to supply such child with clothing necessary and proper for his condition in life.

After books of account have been introduced in evidence, on a trial before a justice, they become the property of both parties, as evidence in the cause, and the party producing them cannot be allowed to withdraw them from the consideration of the jury, without the consent of the opposite party.

THE plaintiffs recovered a judgment in this action against the defendant, before a justice of the peace, for $10.23 damages and $3.94 costs; which judgment was reversed by the Otsego county court; and the plaintiffs appealed from the judgment of the latter court to this court. The action was founded on an account which Stephen Estes had against the defendant for necessary articles of clothing, which it was claimed he furnished to the defendant's minor daughter while she was at work for him (Estes) in 1854, beyond the price of her labor. The defendant's daughter worked for Estes with the defendant's consent; and there was no proof that the defendant had relinquished his right to the earnings of his daughter, or that he consented to her buying any of the articles of clothing of Estes; or that the defendant had neglected to furnish her with clothing necessary and proper for her condition in life. The account books of Stephen Estes were given in evidence, and showed that the goods were charged to the daughter; and there were items of credit to the daughter, on the books, exceeding $20. The issues were tried by a jury. The plaintiffs gave evidence of the delivery of goods to the daughter of greater value than they recovered, independent of the books; and after they had given such evidence the justice permitted them to withdraw their books from the consideration of the jury, and rely upon their other evidence in the case, although the defendant objected to the withdrawal of the books, on the ground that they were the property of both parties. The plaintiffs were assignees of Stephen Estes, and held the account on which they recovered the judgment, as such assignees, in trust for the benefit of the creditors of the assignor. The defendant asked the justice to nonsuit the plaintiffs, and he declined to do it.

B. Estes and *J. E. Dewey*, for the plaintiffs.

E. M. Card, for the defendant.

By the Court, BALCOM, J. All payments which Stephen Estes made to the defendant's minor daughter, for her services, were valid, because the defendant did not notify him that he claimed her wages, within thirty days after the commencement of her services. (*Laws of* 1850, *p.* 579, *ch.* 266.) But the plaintiffs cannot recover of the defendant for articles of clothing which Stephen Estes furnished to the defendant's daughter, beyond the price of her services, for two reasons: 1st, the defendant gave his daughter no authority to procure the clothing, and Estes had none from the defendant to let her have any; 2d, there was no omission of duty on the part of the defendant as to furnishing his daughter with all necessary clothing. (*Van Valkinburgh* v. *Watson*, 13 *John.* 480. 2 *Kent's Com.* 4*th ed.* 192.

The justice erred in permitting the plaintiffs to withdraw the account books of Stephen Estes from the consideration of the jury. The plaintiffs introduced the books as evidence; and they could not withdraw them when they found that the defendant would claim that they showed the goods were sold upon the daughter's credit, and charged to her instead of the defendant; or because the defendant would claim that they showed a credit to his daughter of over $20. When the plaintiffs put the books in evidence, they became the property of both parties, as evidence in the cause; and the plaintiffs could not get rid of their effect, without the consent of the defendant. (*See Winants* v. *Sherman*, 3 *Hill*, 74; *Vibbard* v. *Staats*, *Id.* 144.)

The judgment of the justice was erroneous, and the county court did right in reversing it. The judgment of the county court should therefore be affirmed, with costs.

Decision accordingly.

[OTSEGO GENERAL TERM, July 14, 1857. *Gray*, *Mason* and *Balcom*, Justices.]

In the matter of the application of D. D. Conover *vs.* Charles Devlin.

A common law certiorari stays the proceedings of the court to which it is addressed.

In proceedings under 1 *R. S.* 125, § 56, by a party succeeding to an office, to get possession of books and papers appertaining to it, the issuing of the warrants, after the magistrate has decided that the applicant is entitled to them, is a ministerial and not a judicial act.

A common law certiorari, served after the decision and before issuing the warrants, suspends the powers of the magistrate at that point.

It may not suspend them in the midst of a trial, but at the end of it its operation is to suspend them at once.

If served at any time before execution, or process in the nature of execution, is issued, it stays the issuing.

An order by the court allowing the writ, directing that it shall not be deemed to operate as a stay, does not alter or modify the operation of it in that respect; especially if made after the writ is allowed and served.

Whether a conditional or partial allowance, that the writ shall not stay proceedings, can be made in any case? *Quære?* It *seems* not.

Where application for the writ was accompanied with an application for a stay of proceedings, which was refused; *Held*, that the intention of the court, as shown by refusing the stay, did not change the effect of the writ.

APPLICATION for warrants to commit Charles Devlin to jail until he should deliver up the books and papers pertaining to the office of street commissioner of the city of New York, and directing the sheriff to search for said books and papers and seize them, in order that the same might be delivered to the applicant, D. D. Conover.

D. D. Field, *W. C. Noyes* and *D. Field*, for the applicant.

J. T. Brady, *R. Busteed* and *D. E. Sickles*, opposed.

Peabody, J. Proceedings having been instituted before me, under 1 *R. S.* 125, § 56, to compel Mr. Devlin to deliver to Mr. Conover the books and papers pertaining to the office of street commissioner of the city of New York, on the ground that the applicant was the successor of the late incumbent, to the office to which they appertain, and the parties having been heard from

day to lay until the 8th of July, 1857, and my decision having been announced on that day, that the applicant was such successor, and as such was entitled to the relief asked, that is, to the warrants provided for in that section, one that the respondent be committed to the jail of the county until he should deliver them, and the other that the sheriff search for said property and seize it, that it might be delivered to the applicant, as therein provided, an order to that effect was accordingly made, reduced to writing and signed by me, on the 10th day of said July. That order was immediately served on the respondent, and delivery of the papers, in compliance with it, demanded, which was refused. This refusal was followed by an immediate application for the warrants contemplated by the act, to which, by my decision embodied in the order I had determined, he was entitled. Pending this application, and while a discussion respecting the effect of an injunction then in force, restraining the applicant from taking into his possession the books and papers was in progress, a writ of *certiorari* from the supreme court was served on me, commanding me to certify to that court my proceedings in the premises. The injunction has since been dissolved, and I am now asked to issue the warrants, notwithstanding the *certiorari*.

The fact that this writ, from its operation, suspends the power of the officer to whom it is addressed, is not denied by the applicant, but, on the contrary, it is admitted as a general proposition; but that such is not the effect in this particular case, is insisted on several grounds, some of which seem to arrange themselves under the following heads, and which I will proceed to consider:

1. It is said that this proceeding, in its nature being summary, and intended to confer present possession merely, not to determine the ultimate rights of the parties, is not subject to the operation of this writ. And there is much of good sense in the suggestion that such a proceeding should not be liable to be suspended in this manner. It does not determine the ultimate rights of the parties, but leaves them to be determined in a more grave and formal proceeding. They depend on the

right to the office, for ascertaining which, ample provision was made before. The ancient prerogative writ of *quo warranto* gave contesting claimants a mode of determining controversies respecting office, conclusive in its nature on all the parties interested. In that writ, in its day, as since in the action of the same name, the sovereign was the nominal and real plaintiff, while the person asserting his rights to the office, if there were such a claimant, was made a party incidentally, under the title of relator, and in fact was and is practically plaintiff, so far as the assertion and protection of his own rights is concerned; and the defendant, who was called on by the proceeding to show by what authority he held the office, if unable to show sufficient warrant in law, and found not entitled to it, was, in obedience to the rights of the plaintiff, (and the *quasi* plaintiff, if he was deemed entitled,) ousted. The state was thus freed from the evil of an unlawful exercise of its franchise by an intruder, and a vacancy was made, into which the *quasi* plaintiff or relator was inducted, if his title was approved; and if not, the office remained vacant and ready for the occupation of the person who should be duly selected and qualified to fill it. The right to the office being thus determined, the right to the books and papers appertaining to it followed it as a necessary and inevitable consequence, and thus in a grave and dignified manner the rights of the parties were ascertained and declared, and subsequently, by adequate process, enforced.

This proceeding, however, was not thought sufficiently speedy to answer all purposes, and accordingly, to supply immediate and urgent necessities, the statute under which I am acting is made applicable, by which, in a brief and summary manner, on a decision of the question of succession, in fact, merely, may the incumbent be put into possession of the books and papers for the time being. Thus, until the title can be ultimately ascertained, by the only conclusive adjudication, the person apparently in the possession and use of the franchise, with color of title, may be placed in possession of the books and papers incident to its use.

In a case like the present, where the title to the office is in doubt, effect cannot otherwise be given to this statute without actually deciding the question of title, which I am confident, and all seem to agree, cannot have been the intent of the legislature. To transfer to a person not actually the incumbent of an office at the time, the books and papers incident to it, which are often indispensable to its user, would not only be to adjudge his title in the abstract, but, moreover, for practical purposes, to induct the claimant—to invest him with the office; and thus it would perform the functions of a *quo warranto*, and more. It would be to decide the question of title, incidentally to the question of right to present possession of the books and papers.

Properly applied in this case, this statute enables a person in and occupying an office to get possession of the books and papers incident to it, as the means of performing the duties of the place until the one actually entitled should be judicially ascertained. There would, therefore, seem to be propriety in limiting the decision of this question, in most cases, to the magistrate before whom it should originate, and be heard in the first instance; or at least allowing the matter before him to proceed to its conclusion, before a review should be allowed; and that was, doubtless, the intention of the legislature, in cases ordinarily arising, that a vacuum, said to be abhorrent in nature, should not occur in the administration of the duties of government. The question of temporary possession of books, &c. necessary to the performance of the duties of an office, until the title can be determined, would seem to be a very suitable one to be determined very speedily, and so this act seems to contemplate that it shall be, and such is the course in practice. But that no error, however palpable, no injustice, however gross, should be corrected by a revisory tribunal in any case, does not seem necessary, nor is there any evidence to show it to have been the intent of the legislature. All the usual means of procrastination are excluded. The time for appearing, after service of process, the delays incident to formal pleadings, to formal trials in term time, indeed all formalities, are dis-

pensed with for the sake of speed in arriving at the result But one single mode of reviewing and correcting errors is left, and that by aid of the common law writ of *certiorari*—the venerable, hoary writ, as it was styled on the argument. This writ even is not a matter of strict right, but is always in the discretion of the court, and is only to be allowed in cases of a public nature, where the court sees that there is probably error, and that to review in this manner will, on the whole, be likely to conduce to substantial justice between the parties; and further, that it will do no harm to the public. This is the rule: and where it appears that injustice has probably been done, and that the error can be corrected on *certiorari*, without hardship to the party against whom the writ is asked, or detriment to the public, it should be granted, and in these cases only should it be granted, say the authorities, in effect. Our reports abound in cases where, after solemn argument and grave deliberation, the writ has been refused, and others, in which, after having been granted, it has been quashed by the ablest judges, on the ground that general justice and the public interest did not call for it, or perhaps seemed opposed to it. Such is the case of *The People ex rel. Church* v. *Supervisors of Allegany County*, (15 *Wend.* 198,) and numerous other cases are there cited, to the same end. Throughout the opinion in that case, the learned judge (Bronson) treats it as a writ only to be allowed on special cause shown, and when, in the discretion of the court, it appears that substantial justice between the parties requires, and the public interest at least permits, it. That was a motion to quash a writ already granted, and the court allowed the motion entirely on the ground that, on the whole, it ought not to have been granted, the public interest seeming inconsistent with it, whether the relator had sustained an injury or not. He expressly excludes all inquiry into that, and virtually, for the purpose of the argument, assumes that he might have, and that there might be, no other remedy for him. He says: "Whether the relator has in truth sustained an injury, I do not think it necessary to inquire, nor do I feel called upon to point out a remedy." Of this writ, he says, it does not issue

ex debito justitiæ, "but only on application to the court, and on special cause shown."

From what I have said, it appears, I think, that this remedy by *certiorari* is pretty well hedged about with safeguards. First, that it should appear probable that wrong has been done; and second, that the error is of a nature which can be corrected on certiorari; and third, that the writ will not operate oppressively, and that all these should be determined by the court before the writ should be allowed, and, indeed, *that it should be quashed after it is allowed, if it do not appear that all the requisites occur* in the case. (15 *Wend.* 198.) This seems to me to answer the argument, *ab inconvenienti*, that the writ should not apply to proceedings like this, because of the danger that it would defeat the end designed by the proceeding itself. If the judgment sought to be reviewed, after careful examination, seems to be wrong, and it also seems, *after like careful examination*, that no harm can be done by allowing the writ to take its course, (questions with the decision of which I have nothing to do, but both of which the court granting it is bound to decide in favor of the applicant before it allows it,) the application of the writ would seem not only not inconsistent with this remedy, but there would seem to be no good ground to object to the practice on principle or in policy. The case of *Lynde* v. *Noble*, (20 *John.* 80,) only decides that a *certiorari* issued before trial, to a justice, in proceedings under the "act to amend the act concerning distresses for rent and for other purposes," passed April 17, 1820, should be quashed, as being improvidently issued at this stage of the case. It is far from deciding that while the *certiorari* was allowed to stand, the officer to whom it was issued might disregard it. In that case it was prematurely issued, being before the trial, the court seem to say and the officer did disregard it, so far as to finish the trial to be sure; but no action was taken to determine the effect of his acts, either as to himself or third persons, and, therefore, nothing is decided on that subject, and even *he* refused what I am asked to do—to issue his warrant—until the *certiorari* was quashed. So that that case does not establish the

propriety of the course pursued by the magistrate there even and if it did, it would be no authority for the act I am asked to perform; and, indeed, it seems to be assumed throughout the opinion, that the writ did operate to suspend the powers of the officer after he had made his decision, and thereby terminated his judicial functions, leaving to be done only the ministerial act of issuing his warrant, which is exactly the condition of this case.

It is said that the order made by the court the day after the *certiorari* was issued and served, to the effect that said writ should not be deemed to operate as a stay of proceedings, or to interfere in any manner with the proceedings before me, prevents it having any such effect. But if the *certiorari* the day before, suspended my powers and functions, it is not easy to see how an order of this kind could restore them—the writ being still in existence. The writ itself, of its own force, (*ex proprio vigore*,) when allowed and served, terminated my powers, if it had any application to disturb the proceeding at all; and while it remained unrevoked and in force as a writ, I doubt very much if its legitimate effect could be thus modified by an order of the court itself. My powers are suspended, if at all, by a transfer of the proceedings from me to the supreme court, and a necessary consequence of this would seem to be that I am not in possession of the case, and can take no steps in it. The allowance of the writ was unconditional; and this order, if it have any effect, must have the effect to modify or revoke some part of it, or render it conditional, while by its terms it would seem not so much designed to revoke or qualify the allowance as to explain it, and declare or order (to quote its language) "that the writ shall not be deemed or taken to have a certain effect supposed to follow as a legal consequence from it." What the effects of a *certiorari* are, is a question of law, not usually to be determined by declarations, even of the court allowing it. It was urged on the argument and not denied, and perhaps I am at liberty to assume, that the court, when it allowed the writ, refused to allow a stay of proceedings in addition to it. That would not alter the effect of the writ in that respect, and

it seems it necessarily operated, of itself, as a stay. The mere saying that a writ of *certiorari* or *habeas corpus*, or other process, shall not perform the functions assigned to it by law, or that one of these writs shall have the effect of the other in a particular case, cannot make such a writ operate as it is declared to, differently from its legal province. The chief, and perhaps the only direct effect of this writ, is to remove the proceeding before the officer to whom it is issued to the supreme court. Can an order to the effect that notwithstanding it is removed from before him to the supreme court, still it remains, and shall be deemed to remain, before the officer from whom it is taken, have that effect and make it ubiquitous to that extent?

The case of *Patchin* v. *The Mayor of Brooklyn*, in some of its *obiter dicta* and head notes, seems to conflict somewhat with some of these views, I am aware, but I think that nothing decided in that case does conflict materially with them.

The fatal effects of the writ to this proceeding, the fact that it terminates and for all practical purposes annihilates the whole matter, would be excellent ground for an argument to the legislature to show the necessity of a modification of the law, perhaps, and could possibly have been properly addressed to the court in opposition to the allowance of this writ in the first instance, and it may be of service on the motion to quash it, if such a motion should ever be made, but it can have but little weight with me in determining what are the legal consequences of the writ when allowed and in force.

That the court misunderstood the situation of the proceeding at the time of the allowance of the writ, and would not have allowed it if it had correctly understood it, may also be a good argument on a motion to the same court to quash it; but I cannot know the fact, and if I could, such knowledge would not properly be the basis of action by me. I am to obey the writ as it is, so long as it continues to stand, not to indulge in speculations as to what might or would have been done by the court under other circumstances. My duties depend on what the writ is, not at all on what it might have been, or what was the intent of the court at the time, even if I could know that intent, except as it

is expressed by the fact of allowing it. The fact that the court refused to grant a stay of the proceedings asked in connection with it, and the fact that the same court which made the allowance has since made the order above referred to, seems to show, by double proof, that it was not the intention of the court that any thing having the effect of stay should receive its sanction; and this fact would probably control, on an application to that court, in which alone the impediment complained of can be removed.

It was urged, also, that the signing and delivery of these warrants were judicial acts, and that therefore they were not restrained by the *certiorari*. But my judgment has not only been announced orally, but reduced to writing in the form of an order, and signed by me and delivered to the applicant. I have there decided that the applicant was entitled to the relief asked, that he should have the warrants. Is it possible that the writing of these papers, and signing and delivering them, are judicial acts? And even if they were, they are, so far, separate acts, distinct from the previous proceedings at the trial, that the principle which authorizes the completion of a trial because it is begun—as in the case where the venire had been awarded—(1 *Bac. Abr. tit. Certiorari*, 560, *and* 2 *Hawk. P. C. ch.* 27, § 30,) would not apply here to justify me in proceeding. But it seems to me that it certainly is not a judicial but a ministerial act, and that, therefore, I am bound to refrain.

Finally, I see no mode of escape from the restraining influence of this writ, while it remains in force. The only way of escape for the applicant seems to be through the court granting it, and to that court I must commend him. My hands are certainly bound, and I see no hope of disinthrallment save by the removal of the bonds by the revocation or supersedeas of the writ itself. I am accordingly constrained to suspend my proceedings and decline, for the present, to issue the warrants.

[New York Special Term, July 17, 1857. *Peabody*, Justice.]

24 645
34 113

ELIZA B. ASH *vs.* ROBERT B. COLEMAN and FREDERICK COLEMAN.

In all cases of doubt, such a construction should be given to a will as to make the minor and subordinate parts agree with the main design.

A testatrix devised certain real and leasehold property to the two children of her nephew Thomas Ash, viz: Mary E. Ash and Thomas F. Ash, their heirs and assigns; to have and to hold the same unto the said Mary E. and Thomas F. their heirs and assigns forever, to be equally divided between them, share and share alike. And in case of the death of either of them, then to the survivor of them and his or her heirs and assigns. And *in case* of the death of both of them before they should arrive at lawful age, then the testatrix gave and devised the property to her nephew, the said Thomas Ash, his heirs and assigns forever. The devisees survived the testatrix. Both attained the age of 21 years, and died, Mary E. Ash on the 14th of December, 1843, and Thomas F. Ash on the 12th of February, 1847. *Held*, that the intention of the testatrix was that the secondary devise should take effect, if at all, upon the termination of life at some referable, determinate period, viz: before her own decease, or under lawful age, and not indefinitely. And that, both devisees having survived the testatrix and attained the age of 21 years, each was entitled to an equal moiety of the estate devised. And that upon the death of the shortest liver, the whole estate did not go to the survivor.

CASE submitted for the opinion of the court, upon the construction of a will. The facts upon which the question arose are stated in the opinion of Justice STRONG.

S. E. Lyon, for the plaintiff.

Wm. S. McCoun, for the defendants.

By the Court, S. B. STRONG, P. J. This case has been submitted without action, pursuant to the 372d section of the code. It involves the construction of the will of Elizabeth Ash, which was made on the 22d day of November, 1822. The first and principal clause of the will is in the following words: "First. I give and devise unto the two children of my nephew Thomas Ash, to wit, Mary E. Ash and Thomas F. Ash, their heirs and assigns, all that messuage tenement and lot of ground with the appurtenances, situate, lying and being in the second ward of the city of New York, known by No. 125 Fly market,

and also all my right, title and interest of, in and unto the leasehold lot of ground and premises situate in the said city, known and distinguished by lot No. 33 in John street. To have and to hold all and singular the premises and appurtenances above mentioned, unto them the said Mary E. Ash and Thomas F. Ash, their heirs and assigns forever, to be equally divided between them, share and share alike. And in case of the death of either of them, then to the survivor of them, and his or her heirs and assigns. And in case of the death of both of them before they arrive at lawful age, then it is my will, and I do give and devise all and singular the same unto my nephew, the said Thomas Ash, his heirs and assigns forever." The time of the death of the testatrix is not stated, but it was probably shortly after the date of her will. The devisees survived her. Both attained the age of 21 years, and died, the said Mary E. Ash on the 14th of December, 1843, and the said Thomas F. Ash on the 12th of February, 1847. The plaintiff claims one half of the premises, under a title derived from Mary E. Ash, and the defendant Frederick Coleman claims the entirety under a title derived from Thomas F. Ash after he became the survivor of the two devisees. The defendant Robert B. Coleman is the sole executor of a will which forms the last link of the chain of the title claimed by Frederick Coleman, but he does not seem to have any interest in the controversy.

The main question arises upon the clause of the will which, in case of the death of either of the devisees, gives the whole to the survivor; whether the testatrix meant the death of the shorter liver at *any time*, or at some determinate period, which must have been before her own decease, or under lawful age My opinion is, that the secondary devise was to take effect, if at all, upon the termination of life, at some referable time, and not indefinitely. In all cases of doubt, such a construction should be given to a will as to make the minor and subordinate parts agree with the main design. That is conformable to the ordinary rules of human action. The greater attention is always directed to the principal subject, and the main design is to secure its accomplishment. In this case the first wish of the

testatrix was to give to the two devisees each an *inheritable estate* in one half of the designated premises, as tenants in com mon. That is evinced in clear and appropriate terms. Now if the whole must necessarily devolve upon one, on the prior death of the other at any time, there would have been no inheritable estate in the shorter line. As to him or her, it would be but a life estate. There would be no possibility of a fee in both. It is undoubtedly true that a fee may be given to one determinable upon some contingency, but it must necessarily be upon a limitation which will not absolutely, and at all events, prevent the first taker from having an estate of inheritance. When such first taker may have a fee which may go over tc another upon a contingency, there would be a substitution; but where there is at first nominally a devise or grant in fee, and a subsequent direction that it shall at all events be but a life estate, there is a positive contradiction. I do not mean by this that a fee may not be given to one, determinable on his dying before another, but it must be in terms which may confer a fee upon him in some event. Here, as I have already said, there was an evident intent to give a fee in one of the lots to *two*, and that could not be if one of them could never acquire any higher interest than a life estate. The testatrix refers to the prior death of one of the devisees, which she had in view as a contingent and not a certain event. She says that *in case* of the death of one of them, *then* she gives the property to the survivor. The word "then" evidently refers to the event itself, and not to the time of its occurrence. One of the interpretations given by lexicographers is "in that case." (*Worcester's Dictionary*, *word* "*then*.") Now that one of two human beings will die before the other is so highly probable, that it is ordinarily assumed as a certainty. The testatrix evidently so considered it, in this case, as she, in the contingency to which she alluded, gave the property to the survivor. There is nothing to indicate that the testatrix could have any preference for the longer liver, nor any reason why she should disinherit one for the sake of the other, if both should arrive at a suitable age for the enjoyment and disposition of the property

There is another reason which formerly induced the courts to decide that where property is given to two or more in fee. in severalty, and upon the death of either to the survivors, the death referred to must be within some definite period. If it referred to the decease of the shortest liver whenever it might occur, it would constitute a joint tenancy in effect, which would be inconsistent with the previously declared tenancy in common. Accordingly, in *Lord Bindon* v. *Earl of Suffolk*, where a testator bequeathed £20,000 to his five grandchildren, share and share alike, equally to be divided between them, and if any of them died, his share to go to the survivors and survivor of them, Lord Cowper held that by the first words it was very plain that the legatees were tenants in common, and by the subsequent words it must be intended if any of them should die in the lifetime of the testator. (1 *P. Wms.* 96.) The decision was reversed in the house of lords, but mainly on the ground that the fund, being a debt from the crown, was of such a desperate nature that the testator could not have acted upon the supposition of its present and positive existence. Mr. Jarman says that Lord Cowper's decision has since been repeatedly recognized. (2 *Jarm. Pow. on Dev.* 731.) In the recent case of *Smith* v. *Horlock*, (7 *Taunt.* 129,) a similar construction was given to a devise of real estate. So in *Rose dem. Vere* v. *Hill*, (3 *Bur. Rep.* 1881,) where the testator devised his lands to his wife for life, and after her decease to his five children, (naming them,) and the survivors and survivor of them, and the executors and administrators of such survivor, share and share alike, as tenants in common and not as joint tenants, Lord Mansfield and his associates held that these words were inserted to carry it to the survivors in case of the death of any of the devisees in the devisor's lifetime, and that they took as tenants in common. A similar decision was made in the house of lords in *Wilson* v. *Bayly*, (3 *Br. Parl. Cas. Toml. ed.* 195,) and by the court of common pleas in *Garland* v. *Thomas*, (1 *Bos & Pul.* 82,) and in *Edwards* v. *Symonds*, (6 *Taunt.* 213.) I think the rule to be well established, and still existing, notwithstanding some doubts as to the principle

upon which it is based, in later cases. I do not contend for its applicability to cases where there are circumstances mentioned or referred to in the will indicating a more remote period. In this case, the devise over upon the death of those named in the primary gift, under age, may indicate that the survivor might have taken the whole upon the death of the other, whether it preceded or followed the demise of the testator. But if so, the inference would not extend the required survivorship beyond the minority of the longest liver; certainly not indefinitely, so as to create incompatibility with the principal estate.

The principle upon which I am inclined to decide this case is, that the survivor could not take the whole except upon the death of the other devisee within some determinate period, and that there are no indications of any intent that such period should extend beyond the attainment of the majority of the younger.

The judgment should be that the plaintiff Eliza B. Ash is entitled to the equal undivided half of the premises in dispute, the lot in Fly market, in fee simple absolute, and the other during the continuance of the lease, and if necessary, that she should recover the same.

[ORANGE GENERAL TERM, July 14, 1857. *S. B. Strong*, *Birdseye* and *Emott*, Justices.]

THE PEOPLE *ex rel.* Gertrude Stryker *vs.* GARRIT STRYKER.

24 649
28 417
43 478
51 354
236 585

A compliance with the provisions of the statute relative to voluntary assignments made pursuant to the application of an insolvent and his creditors, is a condition precedent to the discharge of an insolvent debtor from his debts.

If it be apparent from the papers that the true cause and consideration of the alleged indebtedness of an insolvent debtor to a creditor are not set forth in the schedule annexed to his petition, as the statute requires, this is a matter proper for the consideration and determination of the judge who hears the petition.

The creditors, having the notice required by the statute, to show cause why an

assignment of the insolvent's estate should not be made and he be discharged from his debts, should—if they neglect to appear and raise objections—be concluded, in case the officer has the requisite jurisdiction; except as to matters which the statute declares shall avoid the discharge.

And the judge having, in effect, decided that the insolvent has complied with the provisions of the statute, relative to his schedule, the question as to any omission in the schedule is no longer open.

So as to any omission in the affidavit of a creditor; or the want of a certificate that the assignment has been recorded in the office of the county clerk.

The statute, in providing expressly that certain acts or omissions, or any fraud, shall vitiate the discharge, strongly implies that the decision of the judge who hears the application shall be conclusive, as to other matters.

It seems that a person who is not a creditor of an insolvent debtor, and has no interest which has been, or can be, affected by his discharge, has no right to sue out a *certiorari* for the purpose of having the discharge vacated.

THIS was a *certiorari*, directed to Henry A. Moore, Esq., late county judge of the county of Kings, to remove proceedings had before him upon a petition presented by Garrit Stryker, an insolvent debtor, and certain of his creditors, under and in pursuance of article 3d, title 1, chapter 5, of part 2d, of the revised statutes. A return having been made to the certiorari, by the county judge, of the proceedings had before him, terminating in the discharge of the insolvent, the same was argued before Justice EMOTT, at a special term. One of the objections urged was that the schedule annexed to the insolvent's petition did not contain "the true cause and consideration of the indebtedness" to one of the creditors, Isaac G. Hatfield, as required by the statute. (2 *R. S.* 17, § 5, *subd.* 4.) The nature of the debt was thus stated, in the schedule: "Note of insolvent's, made Feb. 3, 1853, for accommodation of insolvent." It was also objected that the affidavit of Hatfield, accompanying the petition, did not state "the general ground and consideration of such indebtedness," as required by section 4 of the statute. (2 *R. S.* 16.) The affidavit was, that the sum annexed to Hatfield's name, subscribed to the petition, was justly due to him from the insolvent, "for the amount of a note of said Stryker, dated February 3, 1853." It was also objected that no certificate was produced before the county judge that the assignment executed by the insolvent had been recorded

in the office of the county clerk, as required by section 29 of the statute. (2 *R. S.* 21.)

The following opinion was delivered by Judge EMOTT, on deciding the motion at the special term.

EMOTT, J. "There is a marked difference between the provisions of the present insolvent act, (2 *R. S. part* 2, *ch.* 5, *tit.* 1, *art.* 3,) and those of the act of 1817, under which the earlier cases were decided. By the act of 1817, the debtor was not only required to set forth clearly in his schedule the true cause and consideration of every debt, but the failure to do so was made expressly to avoid the discharge, as fraudulent in law. (*Laws of N. Y. vol.* 4, *p.* 46.) The cases of *Taylor* v. *Williams*, (20 *John.* 22,) *Slidell* v. *McCrea*, (1 *Wend.* 156,) and *McNair* v. *Gilbert*, (3 *id.* 344,) arose under this statute, and the duty of the court was confined to the construction of the words of the act. When it was determined what should be regarded as a sufficient statement of the cause and consideration of a debt, then it only remained to see if that could be found in the schedule in the instance of every creditor named, and if it did not, the statute *pro facto*, and without more question, pronounced the discharge fraudulent and void. But in the insolvent act revised in 1830, (2 *R. S.* 16,) although every petitioning creditor is required by section 4 to state the nature of his demand, with the general ground and consideration of the indebtedness, and by section 5 the debtor is required to state in his schedule the true cause and consideration of every debt, still there is no provision that a failure to comply with either of these requirements shall of itself render the discharge void. After the officer having jurisdiction in the premises has determined that the statute has been complied with, and the proceedings have gone on to a discharge, this discharge cannot be avoided or impeached, either when it is set up in an action or upon *certiorari*, except for the causes specified in the 35th section. (2 *R. S.* 23.) The framers of the present statute intended that willful and material false statements, and fraudulent omissions and concealments of the

petitioner should avoid a discharge, and might be shown against it. But the rigor of the former statute is relaxed in reference to the consequences of not complying with its mere directions in regard to the statement of the debts. This view of the present statute was taken by this court in the case of *Hurst*, on *certiorari*, (7 *Wend.* 239,) where the objection to the discharge was that in the original proceedings, before the commissioner had permitted them to be amended, the consideration of some of the debts was not stated at all; and, therefore, it might be urged the officer never acquired jurisdiction. The court held that the commissioner had a right to permit the amendment, and that this cured the defect; but the chief justice, in giving the opinion, adverts to the alteration of the statute, and expresses the opinion, distinctly, that the defect pointed out, even if not cured, was not, under the present act, sufficient to avoid the discharge. In *Ayres* v. *Scribner*, (17 *Wend.* 407,) the insolvent had stated in his schedule that he was indebted to the plaintiff on three notes, in a certain sum; the fact being that he was indebted to him on four notes, and for a larger amount. This was not held sufficient, *per se*, to avoid the proceedings, but the facts were submitted to the jury to determine whether the misrepresentation was willful. So in the recent case of *Small* v. *Graves*, (7 *Barb.* 576,) which was very well considered, it was held that the omission to insert the name of any creditor, or the misstatement of the amount due to any creditor, will not of itself vitiate the discharge. It must be an intentional and fraudulent act of deception or concealment, to have such an effect.

The rule of the statute, as interpreted by these authorities, and indeed, even without the aid of judicial construction, is clear and simple. The question in all cases is, whether the concealment or misrepresentation is fraudulent, that is, willful and designed. All the specific acts enumerated in section 35, either of which will vitiate the proceedings, absolutely, are acts which are necessarily and irresistibly proofs of a fraudulent design; which are, in short, of themselves, and by their necessary consequences, frauds upon the law itself But acts or

omissions which may be accidental and innocent, are not to destroy the validity of the proceedings, unless they are determined to have been done with a fraudulent purpose. And although in some cases the misstatements may be so gross, or the omissions so glaring, as to afford conclusive evidence of fraud, yet the question is always one of fraud in fact, and these defects, which under the former statute were legal cause to avoid the discharge, now are only, at the most, the evidence of the intention of the insolvent.

The defects which are specified in these proceedings are, that the true cause and consideration of the principal petitioning creditor's debt is not stated with that particularity which was held to be necessary in the cases in 20 *John.* and 1 *Wend.* in analogy to the statute regulating the confession of judgments, and the construction it had received. But it was not contended that there was any thing more in the present case than a failure to observe the strict injunction of the statute. No misrepresentation was shown, if, indeed, any could be shown in the present proceeding. And I am unable to see how any violent, not to say irresistible presumption, of fraud arises from the imperfect statement of the debt of Hatfield, which is described in the petition and affidavit of the creditor as a note made by the insolvent, and in the schedule of the debtor as a note made by Stryker to Hatfield for Stryker's accommodation. These are loose and inaccurate statements of the cause and consideration of the debt, and certainly would not sustain a confession of judgment; but they do not, to my mind, clearly and conclusively import a fraudulent purpose of either the insolvent or this creditor. The relator, or any other creditors of Stryker, may have this question passed upon by a jury when the insolvent's discharge is pleaded in answer to a suit for any of his debts; but this court cannot, in the present proceeding, upon what I have here before me, presume the proceedings fraudulent and the discharge void.

Another objection to the proceedings—that there is no proof that the assignee ever took the oath required by the statute—needs but little consideration. The statute entitles the debtor

to his discharge, upon producing a certificate that he has executed the assignment required of him, and that it has been recorded. Then, before proceeding to the discharge of any of their duties, the assignees are required to take an oath that they will faithfully execute their trust. It is unnecessary to determine what effect their failure or refusal to take this oath might have upon their own acts, or when, at farthest, it must be taken. It is sufficient to say that there is nothing to be found in the statute, or in the reason of the thing, justifying the conclusion that their neglect can prejudice the insolvent, whose trustees they are made, not by his own choice or nomination, but entirely by the appointment of the officer granting the discharge.

The proceedings of the county judge must be affirmed."

It was thereupon ordered that the writ of *certiorari* be quashed, and the discharge confirmed, with costs. From this decision the relator appealed.

E. Person, for the relator.

P. S. Crooke, for the defendant.

By the Court, S. B. STRONG, P. J. There is no evidence that the relator is a creditor of the insolvent debtor, or that she has any interest which has been or can be affected by his discharge. For that reason I should feel inclined to quash the certiorari in this case, as having been improvidently issued. Courts ought not to be invoked, except to protect the actual interests of the moving party, or the rights of the public. Neither appears to have been invaded in this instance.

Upon the principal question, involving the merits, I concur in the opinion expressed by Judge EMOTT, when the case was before him at special term. It is undoubtedly true that a compliance with the provisions of the article of the revised statutes relative to voluntary assignments made pursuant to the application of an insolvent and his creditors, is a condition precedent to the discharge of an insolvent debtor from his debts.

And it is apparent, from the papers, that the true cause and consideration of the alleged indebtedness of the insolvent debtor to his principal creditor are not set forth in the schedule annexed to the petition, as the article of the revised statutes to which I have referred requires. But that was a matter proper for the consideration and determination of the judge who heard the petition. The creditors had the notice required by the statute, to show cause why an assignment of the insolvent's estate should not be made, and he be discharged from his debts. If they neglected to appear and raise objections, they should be concluded, if the officer had the requisite jurisdiction; except as to matters which the statute declares shall avoid the discharge. The judge having in effect decided that the insolvent had complied with the provisions of the statute relative to his schedule, the question as to any omission in that is no longer open. The same is true as to the omission in the affidavit of the creditor, and the want of a certificate that the assignment had been recorded in the office of the county clerk. The statute, in providing expressly that certain acts or omissions, or any fraud, shall vitiate the discharge, strongly implies that the decision of the judge who hears the application shall be conclusive as to other matters. It is right that it should be so, as otherwise these discharges might be set aside for the omission of the most trifling matter, which might be considered as a condition precedent.

The judgment rendered at the special term should be affirmed, and the certiorari should be puashed.

[Orange General Term, July 14, 1857. *S. E Strong, Birdseye* and *Emott*, Justices.]

KILLMORE *vs.* CULVER.

24 656
57 191
10h 514

Where T., the holder of a note made by C., which he did not wish to sue in his own name, at the suggestion of his counsel, delivered the same to K., taking from the latter his own note for the amount, payable at a future day; upon an understanding that K. should prosecute the note of C., and that if he should not succeed in the collection thereof he was not to pay the note given by him to T., but that such note was then to be returned to him; *Held* that K. could not maintain an action upon the note of C.; he not being the *real party* in *interest*, within sec. 111 of the code.

APPEAL by the defendant from a judgment entered at a special term, upon the report of a referee. The action was upon a promissory note for the sum of $105 and interest, made by the defendant on the 28th of April, 1848, payable to Job D. Tanner or bearer, on demand. The referee reported in favor of the plaintiff for the amount of the note, with interest.

P. Bonesteel, for the appellant.

J. F. Barnard, for the respondent.

By the Court, S. B. STRONG, P. J. This is an action upon a promissory note payable to one Tanner or bearer. The plaintiff alleges in his complaint that he is the lawful holder and owner of the note. The defendant denies that the plaintiff is such lawful holder and owner of the note, and avers that the title and ownership is still in Tanner, and that the note was transferred to the plaintiff conditionally, without consideration, and for the purpose of prosecution. The plaintiff replies that he took the note unconditionally, and for value received, and that he is the lawful owner of it, and of the moneys due and to grow due thereon. It appears from the evidence that Tanner held the note until it was near being outlawed, when, not wishing to sue it in his own name, he, at the suggestion of his counsel, delivered it to the plaintiff, who gave his own note to Tanner for the amount due, payable at a future day. The understanding between them was that the plaintiff should prosecute the defendant's note, and that if he should not succeed in the collection thereof, he

was not to pay the note given by him to Tanner, or any thing for it, but that such note was then to be returned. The question is whether, under these circumstances, the plaintiff can sustain this suit. The code provides (§ 111) that every action must be prosecuted in the name of the *real party* in *interest*, with some exceptions not at all applicable to this case. Is, then, this plaintiff the real party in interest? It seems to me from the evidence given by himself and Tanner, from which I have made the preceding statement, that he is not. He is not at all interested in the event of the suit, for, should he recover, the money must go to Tanner, and should he fail the loss would not be his, but would fall upon Tanner. The engagement of Tanner is not by way of guaranty that the plaintiff should recover the amount of the note; because then the recovery, if had, would be for the plaintiff's benefit, but the money was to be recovered or lost simply for, or by, Tanner. The evidence shows that the note was delivered to the plaintiff, and the suit was instituted by him, because, as Tanner declared to his counsel, he did not want to sue the note in his own name. Tanner took the summons from his own lawyer and handed it to the deputy sheriff, served the notice of trial upon the defendant's attorney, and two subsequent notices of hearing before the referee, served a subpœna upon one witness, and himself attended as a witness at the circuit court. Although Tanner and the plaintiff were both examined as witnesses, neither of them testified that the plaintiff had personally taken any part in the previous proceedings in the suit. Under all these circumstances it appears to me that Tanner, and Tanner alone, is the real party in interest, and that therefore this suit cannot be maintained in the name of the plaintiff.

The judgment should be reversed, and there should be a new trial at the circuit court; costs to abide the event of the suit.

[Orange General Term, July 14, 1857. *S. B. Strong, Birdseye* and *Emott*, Justices.]

24 658
20h 393
34a 217

The Morris Canal and Banking Company *vs.* Peter Townsend and W. H. Townsend.

The legislature may, without violating the constitution, pass an act authorizing a foreign corporation to take lands, in this state, belonging to its citizens, and appropriate the same to its own use for the purpose of constructing a public improvement, on paying a just compensation to the owners.

Accordingly *held*, that the act of April 11, 1855, authorizing the supreme court to appoint commissioners to ascertain and determine the compensation which ought justly to be paid by the Morris Canal and Banking Company, a corporation chartered by the legislature of New Jersey, to the owners of lands in this state taken by such corporation, or injured by them, in constructing a reservoir for their canal, was a valid and binding act; and that it was the duty of the court to appoint appraisers, upon a proper application by the corporation.

Whether the citizens of this state will be benefited by the construction of a public work by a foreign corporation is for the legislature to judge. To that department, and not to the judiciary, the constitution confides the right to determine that question.

It is also for the legislature, exclusively, to determine as to the extent of the interest in the lands, to be acquired by the company. The right to take property to any extent, whether the full or entire title, or only an easement, is implied in the constitutional provision.

The term "property," in the constitution, includes a right of action for injuries to land proposed to be taken for a public purpose; so that it may be included in an assessment, by commissioners, of the value of the land, without a violation of the right to a trial by jury.

APPEAL by Peter Townsend and Wm. H. Townsend from an order made at a special term, appointing commissioners to appraise the damages of the appellants, as owners of land required by the Morris Canal and Banking Company, for the purpose of a reservoir for their canal. In opposition to the petition of the canal company, Peter Townsend presented an affidavit, stating that he was the person named in the petition as the owner of lands in the said county of Orange, proposed to be taken under the act of April 11, 1855. That the canal of the Morris Canal and Banking Company lies wholly and exclusively within the state of New Jersey, as does also the dam referred to in the said act and petition, and no part thereof lies within the state of New York. That the said dam was in existence for several years prior to the passage of the said act of

April 11, 1855, and the lands of the deponent flowed by means thereof, and that the deponent had, as he was advised and believed, a valid and subsisting claim for damages against the said Morris Canal and Banking Company, to a large amount, at the time of the passage of that act, over and above any claim for damages for which a suit had been commenced previous to the passage of that act.

T. McKissock and *J. Larocque*, for the appellants. I. The act of April 11, 1855, under which this proceeding is taken, is unconstitutional and void, because it is a delegation of the right of eminent domain vested in the state, to a foreign corporation located in another state, and subject to no power of visitation or control on the part of the legislature of our own state. There is no precedent of such an act for the benefit of a foreign corporation, and in regard to a work located wholly within another state. (*Const. art.* 10, § 2. *Swan* v. *Williams*, 2 *Mich. Rep.* (*Gibbs*) 427. *Laws of* 1855, *p.* 506.)

II. The act in question is also unconstitutional and void, because the supplying of water for the use of a canal lying exclusively within another state is not a public use, within the meaning of the provision of the constitution on that subject. (1.) No use is public, within the meaning of our constitution, which is not a use for the benefit of this state or of its citizens. (*Const. art.* 1, §§ 6, 7. *Amendts. to Const. U. S. art.* 5.) (2.) There is nothing before the court to show that citizens of New York have any right to use the canal in New Jersey; that the canal company are common carriers, or that the citizens of the state of New York derive any benefit whatever from its existence. (3.) If the facts were so, and if that would help the petitioners, the burthen would be on them to show them. They are not facts of which the court could take judicial notice. (4.) But such a remote, contingent and precarious benefit would not constitute a public use justifying the taking of private property, subject, as it would be, to be taken away, fettered or impeded, at the will of the legislature of another state or of a private corporation. (5.) A public use to facilitate communications be-

tween the states of New Jersey and New York, might justify the taking of private property in either state, by authority of congress, under their power to regulate commerce, but not the taking of private property in either state, under the authority of its legislature, for the use of a work located wholly within the other. (*Taylor* v. *Porter*, 4 *Hill*, 140. *Matter of Albany street*, 11 *Wend.* 149. *Bloodgood* v. *Mohawk and Hudson R. R. Co.*, 18 *id.* 10. *Matter of John and Cherry streets*, 19 *id.* 659. *Varick* v. *Smith*, 5 *Paige*, 137. *Wilkeson* v. *Leland*, 2 *Peters*, 657. 2 *Kent's Com.* 339, 340 *and notes*. *Beekman* v. *Saratoga and S. R. R. Co.*, 3 *Paige*, 45.)

III. The act is also unconstitutional and void, because it purports to authorize the assessment of damages which have been sustained by the owner prior to its passage. The language of the act is, that the commissioners may ascertain the compensation which ought to be made "for the injury which *may have been*, or shall be, occasioned thereto." (§ 5.) And the language in section 1 is to the same effect, providing for an inability to agree with the owner of any real estate in this state which has been, or may be, injuriously affected. (1.) The petition shows that the canal and dam are already existing works. (2.) For every day that the land adjoining the lake has been flowed by their means, the owner had a vested claim for damages against the company, and a right to bring an action, and have his damages assessed by a jury. The provision in the new constitution authorizing an appraisement, by a jury or commissioners, does not reach the case of past damages.

IV. The clause in the 7th section of the act in question, providing that "all real estate and all rights therein acquired by the company, under and pursuant to the provisions of this act, for the purposes of its incorporation, shall be deemed to be acquired for public use," does not help the case. The legislature could not, by so declaring, make a public use out of what was not such, without that declaration. The clause in question, on the contrary, indicates an intention to evade the restraint of the constitution.

V. In the same manner the provision, that in the case of a

second report by the commissioners, "it shall be final and conclusive on all the parties," indicates an effort to deprive the parties interested of their right to appeal.

VI. The intent to invade the restraint of the constitution is further indicated by the provision, that after assessment of the damages by the commissioners, and their payment or tender even notwithstanding, and in case of such appeal as the act *does* authorize, "such appeal shall not affect the possession, by such company, of the lands appraised; and when the same is made by others than the company, it shall not be heard, except on a stipulation of the party appealing not to disturb such possession." (*Last clause of* § 7.)

VII. The act is also unconstitutional and void, because it allows the company to acquire title to the lands themselves. This was more than was necessary for the exercise of the right to flow them, and the legislature have no right to take either any more land, or any greater estate or interest in land, than is requisite for the use intended. (*Cases above cited, particularly the Matter of Albany street*, 11 *Wend.* 149; *Embury* v. *Conner*, 2 *Sand. S. C. R.* 98; 19 *Wend.* 659.)

VIII. The court, in this proceeding, acts judicially as a court, and not ministerially, by virtue of the special authority conferred by the act. The proper time and place to object to the constitutionality of the act was, therefore, on the presenting of the petition, as the proceedings could not be reviewed by *certiorari*, and the only mode of review is by appeal from the order. (*In the matter of Walker street, Court of Appeals. See Striker* v. *Kelly*, 2 *Denio*, 323; *Laws of* 1854, *p.* 592.)

IX. The order of the supreme court appealed from is therefore erroneous, and should be reversed, with costs.

J. M. Van Cott and *D. F. Gedney*, for the respondents. I. By the constitution of the state of New York, private property may be taken for public use, by paying a just compensation. (*Const. art.* 1, § 6.) The legislature may, therefore,

pass laws authorizing the taking of private property in all cases prescribed by the constitution.

II. The act of the legislature under which the respondents seek to acquire a right to overflow the appellants' lands, does not, in form, violate any provision of the constitution; and if this right was sought to be acquired for public use, the act is constitutional. (*Laws of N. Y.* 1855, *ch.* 296. 13 *Peters' Rep.* 519, 584.)

III. The right sought to be acquired under the act, was for public use, because, (1st.) The legislature, the sovereign power, recognizes the existence of the Morris Canal and Banking Company as a corporation of the state of New Jersey, for whose benefit, as a corporation, the right was to be acquired. (*Sec.* 1 *of the act.*) (2d.) The legislature has declared, that any real estate, or rights therein acquired in pursuance of the act, shall be deemed to be acquired for public use. (*Sec.* 7 *of the act.*) (3d.) The right was not sought to be acquired by individuals for private use, but by a corporation, duly recognized by the sovereign power of the state, as necessary to the operation of a canal of manifest public utility.

IV. The *degree* of benefit to the public is not a material question. The benefit may be indirect as well as direct. The purpose of acquiring the right mentioned in the petition was public; and if the purpose be public, the court cannot inquire into the expediency or propriety of the use. (*Harris* v. *Thompson*, 9 *Barb.* 350. 2 *Kent's Com.* 340 *and note. Beekman* v. *Saratoga R. R. Co*, 3 *Paige*, 73. 5 *id.* 159, 160. *Laws of* 1849, *p.* 547.)

V. The right of eminent domain implies the right in the sovereign power to determine the time and *occasion*, and as to what particular property it may be exercised. (*Heyward* v. *Mayor of New York*, 3 *Selden*, 325.)

VI. The court will not declare an act of the legislature unconstitutional, unless a case be presented in which there is no reasonable doubt. (*Ex parte McCollum* 1 *Cowen*, 550.)

By the Court, S. B. STRONG, P. J. The plaintiffs are authorized by the statutes of the state of New Jersey to construct their canal to the line of this state bounding the county of Orange. They found it necessary, or at any rate convenient, for their operations, to construct a dam across the outlet of Long pond or Greenwood lake, which created a reservoir extending into, and crossing some of the lands of, that county. The legislature of this state, by an act passed on the 11th of April, 1855, (*ch.* 296,) authorized this court to appoint commissioners to ascertain and determine the compensation which ought justly to be made to the owners of the lands, for the taking of their real estate, in case the same should be taken, or for the injury which might have been or should be occasioned thereto by such reservoir, and provided that in the action and determination of the commissioners and the payment, tender or deposit of the compensation awarded by them, the said company should be vested with the title to the real estate taken, and all persons made parties to the proceedings should be divested and barred of all right in the lands taken, during the corporate existence of the company, and from all claim or demand on account of injury or damage to the real estate injuriously affected. Some of the lands to be taken or injuriously affected by establishing or continuing the reservoir, belong to the defendants. The company allege that they have offered to pay to these owners a reasonable compensation for their land, and damages, which such owners have refused to accept, and therefore the company have applied to this court for the appointment of commissioners to ascertain and determine the compensation to be made to the defendants for their lands and damages. This court, at special term, made an order for the appointment of such commissioners; from which the defendants have appealed. And they now contend that the order should be vacated and annulled, on the assumption that the act of our legislature is unconstitutional and void.

It is contended that our legislature cannot authorize a foreign corporation, located in another state, and subject to no power of visitation or control on the part of our functionaries, to

take the lands in this state belonging to its citizens. There is certainly nothing in our constitution thus restricting the power of exercising the right of eminent domain. The objection must be urged on the allegation of incompatibility. But incompatibility with what? Certainly not with our ordinary practice. We have recognized the existence of foreign corporations in various ways, and granted to them many privileges, in this state. We have laws to prevent the forgery of the bills of foreign banks. We authorize foreign insurance companies to transact business in this state. Foreign corporations may institute, maintain and defend suits, in our state courts, and they do so. And we have authorized a rail road company of another state—the New York and New Haven Rail Road Company—to extend their road into this state, and to acquire (compulsorily if need be) the title to, or the right to use, the lands of our citizens in the county of Westchester. So far as I have heard, none of the acts conferring such privileges, powers and rights have been deemed incompatible with our institutions, or the rights of our citizens, and therefore void. It might have been well, in the present instance, to have imposed some conditions which would have enabled our state legislature to control (of course indirectly) the general operations of the company, so as effectually to protect the interests of the people of this state. That was not done, probably from confidence in the good intentions of the directors, and a consciousness that it would be for their advantage to promote the welfare of all whose interests or necessities might prompt them to use the canal. We have not, of course, parted with the right to legislate as to the use of that part of the property of the company which shall be within our own borders. That, the legislature has not yielded, and could not, without despotism, yield to another state. In legislating as to the right to take private property for public purposes, it would not vitiate the law even if it should be remiss in providing fully for the interests of the people. If such considerations should be allowed to defeat our statutes, I am apprehensive that many of them would fail.

It is objected that the operations of a corporation in another

state, and conducted principally by inhabitants of that state, cannot be promotive of public good to our citizens, so as to authorize the assumption of their lands. But why not? A canal generally improves a country through its whole extent quite as much at its terminus, though more remote from a market, as at any other point. We can easily see that it may benefit our people near the state line where it terminates. That is enough to feed the power, and to show that it has not been exercised under an illusory pretense. Whether our public will be essentially benefited was for our legislature to judge. The constitution confides the right to judge in that matter to that department, and not to the judiciary. In the case of *Heyward* v. *The Mayor of New York*, (3 *Seld.* 325,) Welles, J. in giving the opinion of the court, says, "Does it" (the right of eminent domain) "imply the right in the sovereign power to determine the time and occasion, and as to what particular property, it may be exercised? Most clearly it does, from the very essence and nature of the right. To deny it would be to abrogate and destroy it."

As to the extent of the interest in the lands to be acquired by the company, that was exclusively for the consideration of the legislature. The right to take property to any extent, whether the full or entire title, or only an easement, is implied in the constitutional provision.

It was made a question, on the argument, whether the term "property" in the constitutional provision, includes a right of action for injuries to land proposed to be taken, so that it could be included in the assessment of the commissioners without a violation of the right to a trial by a jury. I am inclined to think that in this case the trespasses upon the land are so directly connected with the main subject and with the now sanctioned act of taking it, that they may be included. It is a close question, I admit. But it cannot affect the main question, as to the right to acquire the land. That cannot be obtained, under the act in question, without a full compensation to the owners, for their present loss. And if they are also to receive a compensation for antecedent injuries without depriving them

of their right of action, (by reason of an excess in the exercise of a constitutional power,) they cannot be injured.

I think that none of the objections are well taken, and that the order should be affirmed, with $10 costs.

[Orange General Term, July 14, 1857. *S. B. Strong, Birdseye* and *Emott*, Justices.]

Wolfe, executor of Vache, *vs.* Howes and others.

[This case is reported, *ante*, p. 174. The following opinion of Justice Bacon was not received in time to be embraced in the report of the case there. It is thought worthy of preservation, and is therefore inserted here.]

Bacon, J. That the contract of Vache, the plaintiff's intestate, was one for his personal services, is I think quite clear, both from the language of the contract itself, and from a consideration of all the surrounding circumstances. The referee was right in his conclusion on this point, and the case then presents the naked question whether, when a party contracts for services to be rendered for a year, for a given compensation per month, and after having entered upon the discharge of the duty imposed by the contract, and fulfilled in part, he is unable to complete the service and fulfill the contract by his supervening illness and subsequent death, compensation can be recovered under a *quantum meruit* for the work actually performed.

It is said by the court in *Oakley* v. *Morton*, (1 *Kern.* 25,) that an express covenant to do a specific act is not discharged, although its performance is prevented by inevitable necessity. The case did not call for so strong a ruling, because the plaintiff might have fulfilled his covenant by supplying what he had contracted to do. But where there is a personal service to be rendered, and it is prevented by the contractor's sickness and death, then the act of God supervenes and the covenant is discharged, and compensation can be recovered for the service actually rendered. In such case, I should say with Bennett, J.

in *Fenton* v. *Clark*, (11 *Verm. Rep.* 557,) "Common justice requires this, and I should be sorry to find that it was not tolerated by the principles of the common law." A recovery was accordingly allowed in that case; and to the same effect is the case of *Fuller* v. *Brown*, (11 *Metc.* 440.)

The doctrine that one cannot recover where he leaves another's service before the expiration of the stipulated term, applies to a voluntary departure, and not to an abandonment of the service by reason of sickness and inability to continue therein. It is conceded by Nelson, J. in *Beebe* v. *Johnson*, (19 *Wend.* 502,) that strict performance is excused if it appear that the thing to be done cannot *by any means be accomplished;* and that is precisely this case.

In *Fahy* v. *North*, (19 *Barb.* 341,) the same doctrine is declared by the court, and applied to the case where performance of a contract of service for one year was prevented by the sickness of the party who contracted to perform the labor, and the plaintiff recovered for what he had done, on a *quantum meruit.* This is in accordance with justice and common sense, and common honesty; and where these are conjoined, they ought to be, and I think they are, law.

The judgment should be affirmed.

INDEX.

A

ACCOUNT.

1. Where T. & Co. rendered to L. & Co. an account of their mutual dealings, which contained a charge against the latter of $880.48, and showed a balance of $5623.41 due them, and L. & Co. soon afterwards drew a draft on T. & Co. for an amount corresponding with that balance, which was paid, and they suffered several months to elapse before bringing a suit to recover the item of $880.48 as improperly charged to them; *it was held*, that when L. & Co. drew for the balance of the account as sent to them they agreed to the correctness of the charges made in the account; and that from that time the transaction was closed, and they could only open it by proof of fraud or mistake. *Lockwood* v. *Thorne*, 391

2. *Held also*, that the fact that afterwards L. & Co. preferred a claim against T. & Co. for the amount of the disputed charge, could not avail the former firm. And that the fact that T. & Co. were willing to negotiate with L. & Co. for a settlement of the matter in controversy; or that in their dealings with others T. & Co. had been willing to treat other accounts, similarly situated, as open and unsettled, could not change the rights of the parties. *ib*

ACTION.

1. As a general rule, a defendant who has an equitable defense to an action, being now authorized to set it up by answer, is bound to do so, and he will not be permitted to bring a separate action merely for the purpose of restraining the prosecution of another action pending in the same court. *Winfield* v. *Bacon*, 150

2. Since the decision of the court of appeals, in *McKee* v. *Judd*, (2 *Kern.* 622,) all demands arising from injuries to property are assignable, and when assigned, the action is properly brought in the name of the assignee. *Foy* v. *The Troy and Boston Rail Road Company*, 382

3. Where a submission to arbitration provided that a judgment *might* be rendered in the county court, upon the award made in pursuance of such submission; *Held*, that the party in whose favor the award was made might bring an action thereon, without entering any judgment in the county court or waiting for a term of such court to be held. *Burnside* v. *Whitney*, 632

See BILLS OF EXCHANGE, &c. 13, 14.
WARRANTY, 1, 2.

ADMISSIONS AND DECLARATIONS.

See PRINCIPAL AND AGENT.

AGREEMENT.

1. Contracts are to be held to mean what the law of the place where they are made holds them to mean. For ascertaining the tenor, the interpretation, and the nature of a contract, the *lex loci contractus* governs; for deciding what *remedy* is

applicable to the contract so interpreted, the *lex fori* governs. *Hodges* v. *Shuler*, 68

2. The defendants, a manufacturing corporation, having a store of goods, agreed with the plaintiff to sell the same to him for a specified sum, a part of which was to be paid in cash, and the remainder in six, nine and twelve months, with interest. It was also agreed that if the trustees of the defendants, then in office, should, within a specified time, cease to have the management of the affairs of the defendants, and, by reason thereof, the general trade of the hands in the employ of the company should be diverted from the plaintiff's store, and the plaintiff should sustain damage thereby, the defendants should pay him the sum of $300, or discount that amount from any sum the plaintiff might owe the defendants. At the time of making this agreement, the affairs of the defendants were managed by a board of five trustees. Soon afterwards three of the trustees resigned, and other persons were appointed in their places; one of whom was a merchant occupying a store adjoining that of the plaintiff, and who became the treasurer of the defendants. After his appointment, much of the trade of the hands in the defendants' employ went to his store. In an action to recover the $300 mentioned in the agreement, the plaintiff alleged that a majority of the trustees in office when he made his purchase, had ceased to have the management of the affairs of the company, and that by reason thereof the general trade of the hands in the employ of the company had been diverted from his store, and that he had thereby sustained damage. *Held* that the agreement was valid and binding; and that it should have been submitted to the jury to determine whether the general trade of the hands had been diverted from the plaintiff's store; and if it had, then whether such diversion had taken place in consequence of the change in the board of trustees, and whether the plaintiff had sustained damage thereby. And that if the verdict were in favor of the plaintiff on all of these questions, he would be entitled to recover the amount claimed as a deduction from the price of the goods. *De Groff* v. *The American Linen Thread Company*, 375

See DAMAGES, 6.
WORK AND LABOR.

AMENDMENT.

1. In an action upon a promissory note the answer set up the defense of usury. On the trial before a referee the usury was proved, but there was a variance between the proof and the answer, as to the parties to the usurious contract. The referee having reported in favor of the plaintiff, and a judgment having been entered upon the report; *held* that leave to amend the answer, so as to make it conform to the facts proved, could not be granted, except upon the terms of the defendant consenting that the judgment should stand for the amount admitted to be due the plaintiff, with interest and costs. *Gasper* v. *Adams*, 287

2. Sections 169, 170 and 171 of the code relate to the course to be pursued *at the trial* when a variance is alleged, and not to the mode of proceeding after judgment, and when the defendant can only as a favor, ask for an amendment. *ib*

3. Section 173 was intended mainly, if not solely, to allow amendments in order *to sustain* a judgment, not for the purpose of reversing it. *ib*

4. The proper place for deciding upon the propriety of an amendment of the pleadings is at the circuit, where the parties, and their witnesses, are before the court, and where the good or ill faith of the application can be investigated. An application for leave to amend is addressed to the sound discretion of the judge; and his decision upon it will not be reversed, on a motion for a new trial, except in a clear case. There must be some proof that the defense proposed to be set up by the amendment is true, and can be sustained. *Travis* v. *Barger*, 614

APPEAL.

1. If a misjoinder of parties is not objected to in the court below, the

objection cannot be raised on appeal. *Tibbits* v. *Percy*, 39

2. Where a party, on appealing to the county court from the judgment of a justice of the peace, for the purpose of staying execution of the judgment, executes an undertaking, with sureties, conditioned that "if judgment shall be rendered against" the appellant, and execution thereon be returned unsatisfied in whole or in part, the obligors will pay the amount unsatisfied, and the county court reverses the judgment of the justice, and on appeal to the supreme court, that court, at general term, reverses the judgment of the county court and affirms that of the justice, with costs, the sureties are liable, not merely for the amount of the judgment in the county court, but for the amount recovered in the supreme court. *Smith* v. *Crouse*, 433

3. In order to perfect an appeal to the county court from the decision of a justice in summary proceedings to recover the possession of demised premises, under the statute, security must be given. *Deuel* v. *Rust*, 438

4. Notice of appeal must be given in the manner provided by § 351 of the code. Security for the judgment must be given, in the form prescribed by § 356 of the code, which must be approved by some officer formerly competent to allow appeals to courts of common pleas. And, in addition to this, in case of an appeal by the tenant, in order to stay the issuing of the warrant or execution, security must also be given for the payment of all rent accruing or to accrue upon the premises subsequent to the application to the justice. *ib*

5. If security is not given, on appeal to the county court, no appeal is properly taken, and the proceedings are not removed to that court. Consequently the county court has no jurisdiction of the case, either to affirm or reverse the judgment of the justice, and can render no valid judgment, except to dismiss the appeal. *ib*

6. The judgment of the county court, in such proceedings, is not capable of being reviewed by way of appeal. It is *final* in the sense of being *ultimate and conclusive*; at least so far as review by the supreme court, upon appeal, is concerned. BIRDSEYE, J., dissented. *ib*

ARBITRATION AND AWARD.

1. The power of the supreme court to review or vacate an award made under a submission pursuant to the statute, (2 *R. S.* 541. § 1,) is limited to that conferred by the plain words of the statute. The award is final in every case where there has not been either misbehavior or mistake, on the part of the arbitrators. *Ketcham* v. *Woodruff*, 147

2. Thus where parties submitted a controversy to arbitration, by a submission which provided that a judgment of the supreme court should be rendered upon the award, and the arbitrator made his award in favor of the plaintiffs, and judgment was entered thereon; and the defendant made no motion to vacate or modify the award for any of the causes specified in the statute, but appealed from the judgment; *it was held* that he could not review the award upon the merits, by serving a case which stated the testimony before the arbitrator, and his decisions thereon, and the defendant's exceptions thereto. All the testimony and the proceedings had before the arbitrator, at the hearing, were accordingly struck out. *ib*

3. Where a submission to arbitration provided that a judgment *might* be rendered in the county court, upon the award made in pursuance of such submission; *Held*, that the party in whose favor the award was made might bring an action thereon, without entering any judgment in the county court, or waiting for a term of such court to be held. *Burnside* v. *Whitney*, 632

ASSESSMENT.

1. Where land, situated within the bounds of any city or village, in which several persons are interested, is ordered by the supreme court to be sold, under and in pursuance of the act of May 26, 1841, "to authorize the sale of real estate in certain cases, to pay assessments" &c., or under the

act of April 12, 1855, "to provide for the due apportionment of taxes and assessments, and for the sale of real estate to pay the same," one parcel taxed or assessed may be sold by the referee, to satisfy a tax or assessment on a different parcel. *Powers* v. *Barr*, 142

2. The power of sale conferred by the statute, in such cases, is for a special and limited purpose, that of either paying the taxes, before a sale for taxes takes place, or of redeeming from such a sale after it has been made, or both. When these purposes have been subserved—when the taxes and assessments have been paid and satisfied—the power of sale is gone. The remaining land, therefore, cannot be sold, though it may be deemed by the referee, or by all the parties, to be more advantageous to convert the land into money than to retain the same unsold. *ib*

See ASSESSORS.
INSURANCE COMPANIES, 2.
MANDAMUS, 1, 2.
WILLIAMSBURGH, (CITY OF.)

ASSESSORS.

1. In determining the question as to the residence of a person owning real estate subject to taxation, assessors act judicially. And when acting judicially, within the scope of their authority, they are not liable to an action, although they err. *Brown* v. *Smith*, 419

2. Accordingly, where the plaintiff's farm lay partly in the county of Otsego and partly in the county of Herkimer, his residence being in the latter county, and the defendants, assessors of a town in Otsego county, assessed the whole of the farm to him in that county, and upon a warrant issued for the collection of the tax, the plaintiff's property was taken and sold; *it was held* that no action would lie against the defendants, for such erroneous assessment. *ib*

ASSIGNMENT.

Since the decision of the court of appeals, in *McKee* v. *Judd*, (2 *Kern.* 622,) all demands arising from injuries to property are assignable; and when assigned, the action is properly brought in the name of the assignee. *Foy* v. *The Troy and Boston Rail Road Company*, 382

See DEBTOR AND CREDITOR, 6 to 14.

B

BANKS AND BANKERS.

See EXPRESS COMPANIES.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. An instrument executed in the name of a rail road company, by its president and treasurer, by which such company, in four years from date, for value received, promised to pay, in Boston, to A. and B. or order, one thousand dollars, with interest thereon, "payable semi-annually, as per interest warrants hereto attached, as the same shall become due; or upon the surrender of this note, together with the interest warrants not due, to the treasurer, at any time until within six months of its maturity, he shall issue to the holder thereof ten shares in the capital stock in said company in exchange therefor, in which case interest shall be paid to the date to which a dividend of profits shall have been previously declared," &c.; was *held* to be a promissory note, negotiable, and the contract made by indorsing it, to be the usual contract of an indorser of negotiable paper. *Hodges* v. *Shuler*, 68

2. *Held also*, that by the law of the state of Massachusetts, where the note was executed, and made payable, and where it was indorsed, the indorser, by his indorsement, made the same contract as the indorser of a promissory note makes in this state, viz: that if the drawer did not pay the note at maturity, he, the indorser, would pay it, in case the usual steps were taken to charge him. *ib*

3. A notice of protest, which gives the date, time of payment, amount

names of drawer and payees, and the indorsement, of a promissory note, without stating its number, is sufficient, although it appears that at the time of the protest there were four other notes precisely like the one protested, in terms and amount, and distinguishable from that and from each other only by different numbers upon each; the *number* of a promissory note being no part of the instrument. *ib*

4. Where an instrument describes itself as being a promissory note, and on its face it purports to be *negotiable*, by being payable to A. and B. "or order," and the payees indorse it in blank, and thus pass it to the holder as a negotiable promissory note, they will be *estopped* from denying that it is such. *ib*

5. Where the holder of a note, on its arriving at maturity, uses due diligence to ascertain the residence of the indorser, and sends notice of protest to the place designated as such, he will be entitled, as such holder, to recover against the indorser; although in fact, owing to misinformation, the notice was not sent to the right place. And a second indorser, who subsequently pays the amount of the note, to the holder, and thus becomes the owner thereof, stands in the shoes of the holder, and is subrogated to his rights. And this, although he himself knew where the indorser resided, at the time notice of protest was sent. *Beale* v. *Parish*, 243

6. Thus, where the plaintiffs, being the holders of a note, before it fell due indorsed and transferred it to the C. Bank, and T., the notary of the bank, at the maturity of the note, demanded payment of it, and the next day inquired at the C. Bank where the first indorser resided, and was told that they did not know; and he then gave the plaintiffs notice of non-payment, and inquired of them where he should send notice to the first indorser, and was told that he resided either at Dunkirk or Buffalo, and was requested by them to send notice to him at both of those places, which was done accordingly; although the indorser in fact resided at C., and the plaintiffs knew that fact; the plaintiffs subsequently paying the note, at the bank, and becoming the holders thereof; *it was held* that they could maintain an action thereon, against the first indorser. PEABODY, J., dissented. *ib*

7. A promissory note, given in payment of a subscription to the capital stock of a banking association, and discounted by the bank, for the maker, is upon a good consideration, and may be enforced by the receiver of the bank after its failure, notwithstanding that by an arrangement among the directors, of whom the maker was one, the instrument in question, and others of a similar tenor given by the others, were not to be considered as valid promissory notes, in the hands of any person, or for any purpose whatever, unless the directors should elect to pay their notes and take certificates of the stock. *Cowles* v. *Gridley*, 301

8. And a renewal of such a note, at maturity, by the maker, on the assurance of the cashier that the interest paid "will come back to him on the making of a dividend to the stockholders," amounts to a determination of the maker's election to take the stock and to become absolutely bound for the amount. *ib*

9. Where drafts were drawn by J. & M., the general agents at Albany, of a line of tow boats, upon H., the agent of the line in New York, at the request and for the accommodation of the Canal Bank, and signed by J. & M. as "Agents of the Tow Boat Company," payable to their own order and indorsed by them as agents, and subsequently discounted by the plaintiff, at the request of the Canal Bank, for a valuable consideration; *it was held*, in an action against the tow boat company, that the plaintiff, being apprised, by the drafts themselves, that they were drawn by agents, took them at the risk of showing, affirmatively, that the agents not only had the *apparent* authority to make the drafts, but also that the same were actually made for the benefit of the defendants, their principals. *The Exchange Bank* v. *Monteath*, 371

10. Where negotiable paper, obtained from the party executing it by means of fraud, is parted with to an innocent holder, in the usual course of trade, for a valuable consideration, such holder will be protected. *Farrington* v. *The Frankfort Bank*, 554

11. But the valuable consideration must be either a new advance, made at the time; or some prior security must be parted with; or an existing indebtedness actually discharged, in order to complete the title of the holder. *ib*

12. Where the plaintiff was induced, by the false and fraudulent representations of the drawer of bills of exchange, to indorse the same for his accommodation, and the bills were thereupon delivered to the cashier of a bank which then held protested drafts drawn by the same drawer upon the same drawees; there being no agreement between the drawer and the cashier that the new drafts should be received by the bank in *payment* of the protested drafts, but the same were procured by the drawer and delivered to the cashier with the intention that they should be held as additional and collateral security to the protested bills: and the new drafts were subsequently passed to the credit of the drawer, on the books of the bank, and he was charged with the protested bills, and the latter were stamped with the canceling iron of the bank, but still remained in its possession; *it was held* that the plaintiff's indorsement, having been obtained by fraud and misrepresentation, was to be deemed void as against him; and that the bank was not entitled to protection as a *bona fide holder* for a valuable consideration and without notice. *ib*

13. *Held also*, that the plaintiff might maintain an action against the bank to have the indorsements declared void in its hands, to restrain the collection of the bills, and to have the indorsements erased therefrom. *ib*

14. Where T., the holder of a note made by C., which he did not wish to sue in his own name, at the suggestion of his counsel, delivered the same to K., taking from the latter his own note for the amount, payable at a future day; upon an understanding that K. should prosecute the note of C., and that if he should not succeed in the collection thereof he was not to pay the note given by him to T, but that such note was then to be returned to him; *Held* that K. could not maintain an action upon the note of C.; he not being the *real party* in *interest*, within sec. 111 of the code. *Killmore* v. *Culver*, 656

See CORPORATION, 1, 2.

BONA FIDE HOLDER.

See BILLS OF EXCHANGE, &c. 10, 11, 12

BOOKS OF ACCOUNT.

See JUSTICES' COURTS.

BOOKS AND PAPERS.

Compelling delivery of.

See CERTIORARI, 3.
OFFICE AND OFFICER.

BRIDGES.

See COMMISSIONERS OF HIGHWAYS.

C

CANALS.

1. The statute (*Laws of* 1850, *ch.* 278, requiring a contractor with the state for the performance of work upon the canals to execute a bond conditioned that he will pay all *laborers* employed by him, and the general rail road act, containing a similar provision, in respect to laborers employed in the construction of rail roads, were designed to secure the payment of the *actual laborers*; those who do the work on canals and rail roads. They were not intended to include contractors or jobbers, or sub-contractors of portions of the work. *Swift* v. *Kingsley*, 541

2. Accordingly *held* that a sub-contractor, in respect to a portion of the work

contracted to be performed by another, upon a canal, could not maintain an action upon the bond given by the contractor, to the state, in pursuance of the statute, to recover a balance remaining due to him from the contractor. *ib*

CARRIERS.

See EXPRESS COMPANIES.

CASES OVERRULED.

1. *Prosser* v. *Secor*, (5 *Barb.* 607,) overruled. *Brown* v. *Smith*, 419

2. The rent reserved in the manor leases which exist in this state, is a rent charge. The *dictum* to the contrary in *Van Rensselaer* v. *Bradley*, (3 *Denio*, 135,) is not sustained by authority. *Van Rensselaer* v. *Chadwick*, 333

CERTIORARI.

1. Under the provisions of the revised statutes authorizing the removal of proceedings had before any officer into the supreme court by *certiorari*, (2 *R. S.* 563, § 69,) the court has authority to examine and correct any erroneous decision of the officer upon a question of law. *The People, ex rel. Rhoades*, v. *Humphreys*, 521

2. A common law certiorari stays the proceedings of the court to which it is addressed. *Conover* v. *Devlin*, 636

3. In proceedings under 1 *R. S.* 125, § 56, by a party succeeding to an office, to get possession of books and papers appertaining to it, the issuing of the warrants, after the magistrate has decided that the applicant is entitled to them, is a ministerial and not a judicial act. *ib*

4. A common law certiorari, served after the decision and before issuing the warrants, suspends the powers of the magistrate at that point. *ib*

5. It may not suspend them in the midst of a trial, but at the end of it its operation is to suspend them at once. *ib*

6. If served at any time before execution, or process in the nature of execution, is issued, it stays the issuing. *ib*

7. An order by the court allowing the writ, directing that it shall not be deemed to operate as a stay, does not alter or modify the operation of it in that respect; especially if made after the writ is allowed and served. *ib*

8. Whether a conditional or partial allowance, that the writ shall not stay proceedings, can be made in any case? *Quære*? It *seems* not. *ib*

9. Where application for the writ was accompanied with an application for a stay of proceedings, which was refused; *Held*, that the intention of the court, as shown by refusing the stay, did not change the effect of the writ. *ib*

See INSOLVENT DEBTORS, 7.

CHATTEL MORTGAGE.

Where the defendants, who held a chattel mortgage, prior in date to any other, upon a horse owned by the plaintiff, at the request of the plaintiff and for his accommodation, gave him a certificate stating that such mortgage was canceled, at the same time taking from the plaintiff in exchange therefor a mortgage upon other property, for the amount secured by the first mortgage; the plaintiff concealing from the defendants the fact that the property embraced in the second mortgage was already mortgaged to O., a third person, to its full value, by a mortgage not then filed in the clerk's office; but such mortgage was afterwards filed, before the defendants could get their substituted mortgage on file; *it was held* that the defendants, on discovering the existence of the mortgage to O. and that it had been made a prior lien to theirs could repudiate the cancellation of the original mortgage, on the ground of its having been procured by fraud, and take possession of the mortgaged property, by virtue of such mortgage. *Lynch* v. *Tibbits*, 51

COMMISSIONERS OF HIGHWAYS.

1. It is the duty of commissioners of highways to repair bridges, in all

cases, when means are provided by law for that purpose. *Smith* v. *Wright*, 170

2. The commissioners, if they have the means, or have the power of being supplied with the means, to repair the bridges in their town, and neglect to use and exercise the same, are liable for any injury which may result from their neglect of duty. *ib*

3. Where the legislature passed an act requiring commissioners of highways to build a bridge over a creek, "*upon* or *near* the site" of the old bridge which had been erected upon, and in connection with, a public highway; the object of the legislature being to have the bridge reconstructed, so that travel upon the road might be resumed; and a majority of the commissioners, under the authority given them by the act, to fix the site of the new bridge, left the highway, and passing up the stream more than a quarter of a mile, away from any public highway, assumed to locate the site of such new bridge, at a point upon the lands of private individuals, and without their consent, involving an additional expense for right of way; *it was held* that the commissioners went beyond the power conferred upon them by the legislature; and that a mandamus, directing them to proceed and erect the bridge upon the site thus selected, could not be issued. WRIGHT, J., dissented. *The People, ex rel. Kipp*, v. *Finger*, 341

4. *Held*, *further*, that the statute authorizing the erection of the bridge, not having directed that the land of individuals should be taken for that purpose, and no intention of the kind being evinced, and no provision made for compensation to land owners, the commissioners had no authority to take private property, to enable them to build the bridge. *ib*

CONSTABLE.

1. The return of a constable, certifying the time and manner of his serving a summons upon the defendant, is presumptive evidence of what it states. If it appears from that return that the process has been regularly served, and nothing is shown, or offered to be shown, to the contrary, the justice is authorized to proceed in the action; and his judgment, if otherwise regular, cannot be controverted in the same, or a collateral suit. *Wheeler* v. *The New York and Harlem R. R. Co.*, 414

2. Where the statute designates one or more officers of a corporation upon whom process against it may be served, the return of the constable is, in like manner, evidence as to the official character of the person served with such process, and of the facts which justify such service. BIRDSEYE, J., dissented. *ib*

3. But where the defendant appears in season, he may, notwithstanding the constable's return, raise and avail himself of the objection that the summons was not served in such a manner as to confer jurisdiction upon the justice. *ib*

4. Accordingly, where, in an action against a rail road company, the constable returned upon the summons that he had served the same personally on A. B., freight agent of the defendants, at &c., no person having been designated by them upon whom process might be served in the said county, according to the statute, and that no officer of the company resided within the said county, upon whom process could be served; *it was held* that the defendants should have been permitted to show that the service upon the freight agent was unauthorized by the statute, inasmuch as there was a resident director in the county. *ib*

5. Where a constable, to whom a summons had been delivered by a justice of the peace, for service, brought it to the justice, and stated to him that he had personally srrved it on the defendant, and requested the justice to write his return thereon; and the justice thereupon took the summons and wrote this return upon it, in the presence of the constable: "Returned personally served, November 14, 1855, by W. B. Const. fees 75 cts." no name being signed thereto; *it was held* that this return was not sufficient to give the justice jurisdiction, and that a judgment founded thereon was void, and furnished no justification for the arrest

and imprisonment of the defendant, by virtue of an execution issued upon it. GRAY, J., dissented. *Reno* v. *Pinder*, 423

CONSTITUTIONAL LAW.

. The act of the legislature, authorizing the towns in the counties through which the Albany and Susquehanna rail road is located, and in progress of construction, to borrow money, and subscribe for, and purchase, the stock of the company, with the view of aiding in the completion of the work, is not repugnant to any *express* provisions of the constitution; nor is a prohibition upon the power exerted by the legislature to be necessarily *implied* from the provisions of that instrument. *Grant* v. *Courter*, 232

2. The power exercised was within the general grant of legislative authority, and the act is a valid and binding law. *ib*

3. The act does not *deprive* any citizen of his property, nor *take* private property for public use, within the meaning of the constitution. *ib*

4. The meaning of the word *deprived*, as used in § 6 of art. 1, of the constitution, is the same as the word *taken*, in the same section; and when property is not seized and directly appropriated to public use, though it be subjected, in the hands of the owner, to greater burdens than before, it is not *taken* contrary to § 6. *ib*

5. The act of March 18, 1854, authorizing the loan of the credit of the city of Albany to the Northern Rail Road Company, was an exercise of the legitimate power of legislation. *Benson* v. *The Mayor &c. of Albany*, 248

6. The exercise of this power was not "adverse to the spirit" of the constitution, so as to authorize the judicial tribunals to declare the act void. *ib*

7. There is no prohibition in the constitution against the exercise of such a power by the legislature. *ib*

8. The remedy for the evils, if any, which grow out of grants of power to municipal corporations to loan their credit is not to be found in appeals to the judicial tribunals, but must be sought through other channels. *ib*

9. Works of internal improvement may be constructed by general taxation, and in case of local works, by local taxation; or the state may aid in their construction by becoming a stockholder in private corporations; or authorize municipal corporations to become such stockholders for that purpose. *Clarke* v. *The City of Rochester*, 446

10. Rail roads are public works, and may be constructed by the state, or by corporations; and lands taken for their use are taken for the *public use*, and may be so taken, on payment of a just compensation. *ib*

See LEGISLATURE.
ROCHESTER, (*City of.*)
SURROGATE, 6.

CORPORATION.

1. Where a promissory note, purporting to be the note of a manufacturing corporation incorporated under the act of March, 1811, was signed by a clerk, in the name of the general agent of the corporation, as agent, by his direction, and it was shown that the note was in the form which had been customarily used and approved by the company in other similar cases, and which had always been recognized by them, and the money for which it was given was used by the company in its business; *Held*, that this was sufficient proof of the execution of the note by the company to go to the jury: and to warrant the jury in finding that the company had adopted, by usage, the signature of their agent as their own, and intended to be bound by it. *Mead* v. *Keeler*, 20

2. A company incorporated under the act of 1811, has power to borrow money to be used in its legitimate business, and to bind itself in its corporate capacity, by a written obligation for its payment. *ib*

3. After a manufacturing corporation has been recognized by the court as

a duly constituted corporation, under the act, and has claimed to be and has acted as such for over twenty years, and an individual has recognized its corporate existence by becoming the owner of a portion of its stock and continuing to hold it until the dissolution of the company, he will not be permitted, when sought to be made liable for a debt of the company, to allege that the corporation has never been legally incorporated *ib*

4. Whatever a corporation would be obliged to prove, in an action brought by it, upon the issue of *nul tiel corporation*, may be controverted in an action brought against the corporation for relief based upon the corresponding allegation that no such corporation ever existed. Beyond this, the party contesting the corporate existence of the company cannot go. *Jones* v. *Dana*, 395

5. All that a corporation is called upon to prove, to establish its existence, in a litigation with individuals dealing with it, is its charter, and user under it. *ib*

6. If a company has in form a charter authorizing it to act as a body corporate, and is in fact in the exercise of corporate powers at the time of taking a promissory note from an individual, it is, as to him and all third persons, a corporation *de facto*, and the validity of its corporate existence can only be tested by proceedings in behalf of the people. *ib*

COSTS.

In proceedings under the act of May 26, 1841, "to authorize the sale of real estate in certain cases, to pay assessments," or under the act of April 12, 1855, "to provide for the due apportionment of taxes and assessments and for the sale of real estate to pay the same," no extra allowance for costs can be made. *Powers* v. *Barr*, 142

COUNTY JUDGE.

1. The revised statutes (2 *R. S.* 148, 149, §§ 1, 2) do not confer upon county judges any authority to entertain proceedings by habeas corpus, in behalf of a wife, living in a state of separation from her husband, respecting the custody of a minor child. The supreme court alone—not a justice of that court nor a county judge—is invested with the power given by those sections. *The People ex rel. Rhoades* v. *Humphreys*, 521

2. Nor does the 86th section of 2 *R. S.* 575, which declares that the several provisions contained in the title relating to writs of habeas corpus shall be construed to apply, so far as they may be applicable, and except when otherwise provided, to every writ of habeas corpus authorized to be issued by any statute of this state, extend the power specially granted to the supreme court by 2 *R. S.* 148, §§ 1, 2, to the county judge. *ib*

COVENANT.

1. A covenant for the payment of rent, whether it be made by the grantee of lands in fee, reserving rent to the grantor, or by a lessee for a term, belongs to that class of covenants which are annexed to, and run with, the land. *Van Rensselaer* v. *Bonesteel*, 365

2. The land itself is the principal debtor, and the covenant to pay rent is the incident. It follows the land upon which it is chargeable into the hands of the assignee. *ib*

3. The assignee takes the land with all the advantages to be derived from the covenants of the grantor concerning the land, and he assumes all the burdens resulting from the covenants of the grantee. *ib*

D

DAMAGES.

1. In an action for the breach of a contract to convey lands, the true rule of damages is, the value of the land at the time of the breach, and interest from that time. *Brinckerhoff* v. *Phelps*, 100

2 In an action brought to recover damages for injuries done to the plaintiff's house, grounds, fruit trees, &c., by water alleged to have been turned on to the plaintiff's land by the defendants, in constructing a rail road, it is proper to charge the jury that the rule of damages in that class of cases, is the difference between the value of the plaintiff's premises before the injury happened, and the value immediately after the injury, taking into account only the damages which have resulted from the defendant's acts. *Chase* v. *The N. York Central Rail Road Co.* 273

8. But it is erroneous to charge, in such an action, that the plaintiff, after the water was in her cellar, was bound to use *ordinary care and diligence* to prevent her house being injured thereby, and *only* ordinary care and diligence; and that if the damages to the house complained of, or any part thereof, resulted from a neglect to use such care and diligence, the defendants are not liable for the damages thus resulting. *ib*

4. The owner of the house, under such circumstances, is bound to use reasonable care, skill and diligence, adapted to the occasion, to save her house from being injured by the water, notwithstanding it came upon her premises by the fault or negligence of the defendants; or suffer the loss herself. *ib*

5. In an action against a sheriff, for neglecting to collect or return an execution against property, although the measure of damages which the plaintiff is presumptively entitled to recover, is the amount due on the execution, yet the sheriff, on the trial, may prove that the defendant had no property, or not sufficient property out of which he could have satisfied the execution, by using the diligence required of him; which proof may be rebutted by the plaintiff, and thus the whole question as to what damages the plaintiff had sustained by the neglect of duty complained of, will be left open, to be settled by the jury. *Humphrey* v. *Hathorn*, 278

6 H. drew a draft upon McB. as follows: "On demand after date deliver to the order of J. A. B. one hundred gross of inlaid mosaic knobs, worth five dollars per gross, and charge same to account of" &c. Underneath this order was the following guaranty, signed by H the drawer: "For and in consideration of one dollar to me in hand paid, receipt whereof is hereby acknowledged, I guarantee the delivery of the above knobs, as per order, to Mr. B. as per agreement with Mr. McB." This order was accepted by McB. On the same day, H. gave to B. a receipt in these words: "Received, New York, April 8, 1846, from A. McB. his acceptance of a draft on demand for one hundred gross of mosaic inlaid knobs, which I promise to deliver to J. A. B. or his order, upon his ceasing to transact business for said McB. according to an agreement bearing even date herewith, and upon the finding any balance due the said B. from the said McB., according to the tenor of said agreement." In an action brought by the administrator of B. against H., to recover possession of the draft, acceptance and guaranty, the complainant alleging a demand and refusal; *it was held*, 1. That the draft and guaranty formed but one undertaking on the part of H., viz: that McB. should deliver to B., on demand, 100 gross of knobs at $5 per gross; and that if McB. did not deliver the knobs, or any part thereof, H. should make up the deficiency. 2. That H.'s agreement to deliver to B. the draft and guaranty on the cessation of the business and the finding a balance due from McB. to B did not in any degree extend his liability; it being but an engagement on his part, that on the happening of those contingencies B. should be put in possession of the securities, and be at liberty to enforce any claims he might have on H. by reason of them. 3. That H. having refused to deliver the draft and guaranty, on demand, the value thereof to B. was the rule of damages. 4. That upon McB.'s delivering to B. certain substituted articles in the place of the knobs, and B.'s acceptance thereof, the engagement of H. was complied with, and there could therefore be no recovery against him upon the draft and guaranty. 5. That consequently B. had sustained no damage by the re-

fusal of H. to deliver to him the draft and guaranty on demand. *Bush* v. *Hibbard*, 292

7. In an action to recover damages for an unlawful conversion of the plaintiff's property, the rule of damages is, the highest value of the property at any time between the act of conversion and the day of trial. ROOSEVELT, J., dissented. *Wilson* v. *Mathews*, 295

8. In such an action the plaintiff cannot recover as special damages the costs and expenses of an unsuccessful suit against a person to whom the defendant had delivered the property. *ib*

9. In an action brought upon a warranty, by an assignee, the measure of damages is the sum which the assignor might have recovered, had the action been brought in his name. *Sweet* v. *Bradley*, 549

See EASEMENT.

DEBTOR AND CREDITOR.

1. *Creditors how assisted, in equity.*

Where a debtor interposes a fraudulent obstruction, to prevent his creditor from collecting a judgment on which the creditor's remedy as against the specific property covered by the fraud would have been ample at law, but for the fraudulent obstruction, a court of *equity* will interpose to clear away that obstruction, so that he may pursue his legal remedy with effect. *Wilson* v. *Forsyth*, 105

2. To entitle himself to this relief, the creditor must show in his complaint, where he follows his remedy against real estate—1. That there is such real estate; 2. That the judgment would have been a lien thereon, had not the fraudulent obstruction been interposed; 3. That by reason of such interposition his execution cannot reach it, and that therefore his remedy at law is not sufficient. *ib*

3. A complaint alleged that on the 30th of September, 1853, F. was the owner of certain real estate; that on that day the plaintiff commenced an action against him in the supreme court, to recover a debt, and sued out an attachment against the property of F. as an absconding debtor, and delivered the same to the sheriff, who attached the real estate of F.; that the plaintiff obtained a judgment in his action, and docketed the same on the 24th of January, 1854, and issued an execution the next day, on which the sheriff made a portion of the debt out of the personal property, leaving a balance due and unpaid upon the judgment; and that F. had no other personal property, from which such balance could be made. That on the 24th of August, 1853, F. assigned all his property, real and personal, to the defendant; who, under such assignment, claimed to hold and possess the right to and over the real estate; and that such assignment was fraudulent and void, and was made with intent to hinder, delay or defraud the creditors of F. and particularly the plaintiff. And the prayer was that the assignment might be set aside as fraudulent and void as against the plaintiff. *Held* that such a case was not stated as was necessary to give the court *equitable* jurisdiction of the matter; there being no averment that the plaintiff's remedy *at law* was not ample; no claim that the assignment hindered or obstructed him in enforcing his execution, or prevented his selling the real estate thereon; and no averment that a purchaser on such a sale could not contest the validity of the assignment; or that *any* purchaser could not contest it *at law*. *ib*

4. *Held also*, that this was not the usual creditor's bill, of the old practice, to which the return of an execution unsatisfied was a condition precedent, while in this case the execution was not returned at all. Nor was it a suit to remove a cloud upon the title, because the plaintiff did not pretend to have any title. *ib*

5. *Held further*, that the plaintiff having obtained judgment in the action in which the attachment was issued, and an execution having been issued thereon, and a balance remaining uncollected, the sheriff could sell so much of the real estate attached as was necessary to satisfy that balance. *ib*

8. Such a judgment, when obtained, for its lien on both the personal and real estate attached, relates back to the time of levying the attachment; taking its priority from that date. *ib*

2. *Assignment by debtor, for benefit of creditors.*

7. In determining as to the validity of an assignment made by a debtor, the *intent* of the *assignor* is the material consideration. Honesty of purpose in the *assignee* is not the test. *Wilson* v. *Forsyth*, 105

8. Nor is it material to inquire what *other* acts, besides making the assignment, the assignor has done; or whether those acts are fraudulent or otherwise. *ib*

9. In each case the only pertinent inquiry is, with what intent was the assignment made. *ib*

10. An assignment giving preferences among creditors, and not embracing *all* the debtor's property, is not void for those reasons. *ib*

11. And as a debtor is not bound to assign *all* his property, to make his assignment valid, so the assignment is not necessarily rendered invalid by his failing *to deliver* all of his personal property to the assignee, although the whole is assigned. *ib*

12. Although it is a general rule that to give full effect to an assignment of personal property, delivery of the property and a continued change of possession are requisite, and the assignor's continuing in possession of the whole or even a part of the assigned property is *a badge of fraud*; yet, where there is no inventory of the assigned property, accompanying the assignment, the assignor's retaining some property that he might have assigned, or that—being covered by the general terms of his assignment—he might have delivered under it, is not an act that will make the whole assignment void of course. *ib*

13. To render an assignment void, when not void on its face, as a matter of law, the fact of a fraudulent intent *in making it* must be found and found from evidence that will fairly support the finding. It must also be an intent to commit a fraud on creditors by *making the assignment*, and not by some entirely independent act. *ib*

14. It is erroneous to charge the jury that if the assignor, on absconding after executing the assignment, carried off a sum of money with him, the assignment is void, and that it becomes the duty of the jury to find that it was executed with intent to hinder, delay and defraud creditors. *ib*

15. It is also erroneous to charge that if the assignor, when he executed the assignment, intended to reserve a large sum of money to his own use, and did take it away with him, after the assignment was made, the case is the same as if the money had been reserved on the face of the assignment. *ib*

DEED.

See EASEMENT, 1.

DELAWARE AND HUDSON CANAL COMPANY.

1. The Delaware and Hudson Canal Company have the power, under their charter, to enlarge their canal. *Selden* v. *The Delaware and Hudson Canal Co.* 362

2. But though they possess this power, and, upon making compensation therefor, to take private property for that purpose, they are liable to remunerate individuals in damages, for any injuries they may sustain as the consequence of such improvement. *ib*

3. If, by means of the enlargement—a lawful act in itself—the lands of an individual are inundated, even though the work may have been performed with all reasonable care and skill, it is a legal injury, for which the owner is entitled to redress. *ib*

4. The owner of the land injured is not confined to the remedy provided in the ninth section of the compa-

ny's charter. If he chooses to resort to his common law remedy by action, he may do so, *ib*

DEMAND.

See PLEADING, 1, 2, 3.

E

EASEMENT.

1. Where the heirs at law of a person dying seised of a tract of land, which descended to them as tenants in common, caused the same to be subdivided into nine lots, and a map of such subdivision to be made, by a surveyor, and partitioned the same among themselves, by mutual conveyances and releases of the lots, to each other, which mentioned and referred to the said map, on which a road was laid down as running through the center of the tract; and subsequently two of the heirs sold and conveyed their respective lots to purchasers, by deeds referring to the map and to the road so laid out upon it; *Held* that the map was part and parcel of the several conveyances, and that such conveyances were to be taken and deemed as subject to, and controlled by it. That the road being laid out, upon such map, and the lots bounded by it, each grantee was entitled to the enjoyment of the easement thus conveyed, and that he and his grantees could recover damages for its obstruction by the others, or by persons claiming under them. *Smiles* v. *Hastings*, 44

2. *Held also*, that this right of way was a servitude to which each lot was equally subject, and was of the same character and force as if created by express grant. And that by virtue of the release and conveyance of a lot to either of the heirs, by its number, on the making of the partition, the grantee became entitled, as part of the grant, to a right of way over the road laid down on the map, as an easement; which, being appurtenant to the land, passed to the grantees of such heir. *ib*

3. *Held further*, that in case either of the lots in the subdivision was so situated that there was no access to it by any public road or any other means, without passing over the lands of other persons, a right of way passed to the grantee, over the land of his grantors, as a way of necessity, incidental to the grant, and without which the grant would be useless. And that such right, being appurtenant to the land, would pass to persons deriving title from the original grantee. *ib*

4. An easement acquired by deed can never be lost by non-user. To be thus lost, it must have been acquired by use. *ib*

EJECTMENT.

The plaintiff in an action of ejectment will not be estopped from asserting his legal title, by the circumstance that, before such title was acquired, he executed to the defendant's remote grantor an agreement of indemnity against any damage he might sustain by reason of the covenants of warranty in a deed of the premises given by such remote grantor, under which deed the defendant entered and claimed. T. R. STRONG, J., dissented. *Dwight* v. *Peart*, 55

ESTOPPEL.

See BILLS OF EXCHANGE, &c. 4.
EJECTMENT.

EVIDENCE.

1. When two letters are written simultaneously, signed by the same individual, containing the same words, and addressed to the same person, one being sent to the person addressed and the other retained by the writer, each is an original, and the one retained may be given in evidence without proving any notice to produce the other. *Hubbard* v. *Russell*, 404

2. Where the plaintiff offers evidence at the trial, which is received with-

out any objection on the part of the defendant that the proper foundation was not laid for it in the allegations of the complaint, the objection cannot be raised afterwards, but will be considered as having been waived. *ib*

8. Where, upon the sale and purchase of a horse, a bill of sale was executed by the vendor, specifying the price and acknowledging its receipt, *it was held* that the instrument was to be construed as being a mere receipt for the purchase money, and not as a contract, whose written terms could not be varied by parol; and that parol evidence of a verbal warranty was therefore admissible. *Filkins* v. *Whyland*, 379

See PRINCIPAL AND AGENT.

EXECUTORS AND ADMINISTRATORS.

In an action against an executor, for the recovery of a legacy which the defendant alleges has been paid by him, to a stranger, for the benefit of the legatees, the stranger need not be made a party defendant. *Gleason* v. *Thayer*, 82

EXPRESS COMPANIES.

1. *Prima facie*, a person receiving money is entitled to it, and does not become a debtor to the person delivering it. Some evidence in explanation of the transaction is necessary to establish a liability by the receipt of the money. Hence, a bank in the city to which a package of money is sent by bankers in the country, by express, being considered the owner of the money, may authorize the same to be delivered at the office of the express company, or at any other place, in the city, to any person it may select; and the express company, on making such a delivery, will be discharged of their obligation in respect to the delivery; whether their obligation be that of common carriers, or of forwarders only. *Sweet* v. *Barney*, 533

2. The substance and spirit of what the persons sending the money, under such circumstances, exact, and the express company undertake, in regard to a delivery, is that there shall be such a delivery in the city as will charge the bank there with the receipt of the money, as between it and the persons sending it. *ib*

3. Where a package of money, thus sent, is directed to a bank in the city of New York, at its usual place of business, it is the duty of the express company—in the absence of any authority from the bank for a different mode of delivery—to deliver the package at the banking office, to the officer or clerk whose business it is to receive money for the bank. *ib*

4. And if it appears that it is the usual course of business of the express company to deliver money packages according to their address, it will be assumed that any particular package was delivered to, and received by, the company in reference to that practice, where there is no express contract in regard to the place of delivery, or the officer or person to whom the delivery shall be made. *ib*

5. In case of a package of money sent by country bankers to a bank in the city of New York, directed to it at its place of business, only a delivery at the office, to the proper officer of the bank, will be a delivery according to the address on the package, or which will charge the bank with the money. *ib*

6. But a delivery at the banking office, to the general receiving agent, being for the benefit of the bank alone, the bank may waive the same, and receive the money at a different place in the city, and by a different agent, and the express company be thereby discharged from liability. *ib*

7. The delivery of the money by the express company, at their office, to a person usually employed as a porter at the bank, being insufficient, unless it was authorized by the bank, it is incumbent on the company, for their defense, to prove such authority. This may be direct and express, or implied from the acts of the porter, such as receiving money for the bank, on other occasions, at the express office, sent to it in a similar way and with a similar address as that in question, with the knowledge and assent of the bank. *ib*

F

FORCIBLE ENTRY AND DETAINER.

1. Wher. proceedings under the statute relative to forcible entries and detainers are brought into the supreme court on certiorari, it is within the power of the court to examine them, and to quash them, if found irregular or insufficient. *The People, ex rel. Niles*, v. *Smith*, 16

2. To constitute a forcible entry and detainer, it must be accompanied by circumstances of force, or terror, in respect to the person. A mere naked trespass upon the premises is not sufficient. *ib*

FORECLOSURE SUIT.

See MORTGAGE.

FRAUD.

See BILLS OF EXCHANGE, &c. CHATTEL MORTGAGE.

H

HUSBAND AND WIFE.

1. Where money belonging to a married woman and which has never been in her husband's possession, is lent by her, with his assent, and a promissory note given to her for the amount, she may maintain an action thereon without joining her husband as co-plaintiff. *Smart* v. *Comstock*, 411

2. Where a female, prior to her marriage, comes into the possession of money, which she invests, and after her marriage she keeps the same in the form of a chose in action, payable to her, with the express consent of her husband, it remains her property, and an action upon the security is properly brought in her name alone. *ib*

3. If a married woman, seised of real estate which accrued to her during coverture, does not avail herself of the right, given by the statute, to *convey* or *devise* the same, her husband will, upon her decease, become tenant by the curtesy whenever he would have been such tenant prior to the act of April, 1848, for the more effectual protection of the property of married women. *Clark* v. *Clark*, 581

I

INFANTS.

1. Before suit can be brought by an individual to recover the possession of lands conveyed by him during his infancy, he must make an entry upon the lands and execute a second deed to a third person; or do some other act of equal notoriety in disaffirmance of the first deed, such as demanding possession, or giving notice of an intention not to be bound by the first deed. *Voorhies* v. *Voorhies*, 150

2. Under the present system of pleading, this act of disaffirmance must be averred in the complaint, and is necessary to be proved. *ib*

3. The conveyance of an infant will not be ratified by a bare recognition of it, or a silent acquiescence in it, for any time less than the period of statutory limitation. *ib*

4. If it appears from the complaint that the plaintiff has suffered 20 years after he arrived at his majority to pass by before bringing suit to recover possession of land conveyed by him during infancy, *it seems* this is an objection to be taken advantage of by answer, and not by demurrer. *ib*

5. Where an infant conveys one tract of land by deed to one person, and another tract by a separate deed to another person, and the latter has granted portions of the land purchased by him to several purchasers, the infant, after becoming of age, cannot bring a joint action against both of his grantees and against the purchasers from one of such grantees to recover possession of the premises. *ib*

INJUNCTION.

1. No court, in this state, can rightfully enjoin a defendant from proceeding in a suit in another court of the

state, having equal power to grant the relief sought by the complaint. *Winfield* v. *Bacon*, 154

2. B., a watchmaker, having acquired a reputation as such on account of the superior character of his watches, which were stamped with his name, sold to S. the right to stamp B.'s name on watches manufactured by S., and S. assigned to the plaintiffs the right to stamp B.'s name on watches made by them. The defendants had on hand, for sale, watches made by B. and stamped with his name. *Held*, that an injunction would not lie to restrain them from selling the genuine article, and thus to protect the plaintiffs in selling the simulated. *Samuel* v. *Berger*, 163

3. The supreme court will grant its aid to restrain, by injunction, the imposition of any tax or burthen on the tax payers of a city contrary to law, on a complaint filed by any tax payer, on his own behalf as well as on behalf of others similarly interested; or on behalf of any corporator of the city having an interest in the corporate property thereof, on a similar complaint, showing an illegal diversion or application of the corporate property. *Wood* v. *Draper*, 187

4. But the plaintiff in such a case must aver that he files his complaint not only on his own behalf but on behalf of all others similarly situated. Such an averment is essential to a complete determination of all the rights affected by the suit. *ib*

5. An injunction will not be granted for the purpose of restraining the defendants, generally, from exercising any of the functions of an office, during the pendency of a suit brought by the attorney general, to determine their right to the office, and until the decision of the question as to the validity of the law under which they claim to hold. *The People, ex rel. Wood*, v. *Draper*, 265

See NEW YORK, (CITY OF.)

INNKEEPERS.

1. The loss of the goods of a guest, while at an inn, is presumptive evidence of negligence on the part of the innkeeper. Upon this presumption he is *prima facie* liable. But he can repel it by showing that the loss is attributable to the personal negligence of the guest himself. *Fowler* v. *Dorlon*, 384

2. Gross negligence need not be shown. It is enough to exonerate the innkeeper, if the guest has, by his own neglect or imprudence, exposed his goods to peril. *ib*

3. In an action against an innkeeper, to recover for the loss of money contained in a valise, the defendant has a right to have the jury instructed, in reference to the plaintiff's conduct at the time of the loss, that if they are of opinion that in concealing the fact that the valise contained money, and treating it as mere baggage, he was guilty of gross negligence, the defendant was exonerated from liability. *ib*

INSOLVENT DEBTORS.

1. A compliance with the provisions of the statute relative to voluntary assignments made pursuant to the application of an insolvent and his creditors, is a condition precedent to the discharge of an insolvent debtor from his debts. *The People, ex rel. Stryker*, v. *Stryker*, 649

2. If it be apparent from the papers that the true cause and consideration of the alleged indebtedness of an insolvent debtor to a creditor are not set forth in the schedule annexed to his petition, as the statute requires, this is a matter proper for the consideration and determination of the judge who hears the petition. *ib*

3. The creditors, having the notice required by the statute, to show cause why an assignment of the insolvent's estate should not be made, and he be discharged from his debts, should—if they neglect to appear and raise objections—be concluded, in case the officer has the requisite jurisdiction, except as to matters which the statute declares shall avoid the discharge. *ib*

4. And the judge having, in effect, decided that the insolvent has complied with the provisions of the statute, relative to his schedule, the question

as to any omission in the schedule is no longer open. *ib*

5. So as to any omission in the affidavit of a creditor; or the want of a certificate that the assignment has been recorded in the office of the county clerk. *ib*

6. The statute, in providing expressly that certain acts or omissions, or any fraud, shall vitiate the discharge, strongly implies that the decision of the judge who hears the application shall be conclusive, as to other matters. *ib*

7. *It seems* that a person who is not a creditor of an insolvent debtor, and has no interest which has been, or can be, affected by his discharge, has no right to sue out a *certiorari* for the purpose of having the discharge vacated. *ib*

INSURANCE COMPANIES.

1. Where the act incorporating a mutual insurance company declared that all persons who should insure with the corporation should thereby become members thereof, during the period they should remain so insured, and no longer; *Held*, that the fair interpretation of this provision was that persons insured by the company should respectively remain members of the corporation during the time their policies, by their terms, were to continue; and that such membership would not be terminated by a total loss of the property insured. SMITH, J., dissented. *Bangs* v. *Scidmore*, 29

2. It was accordingly *held*, that a premium note, given by a person, on becoming a member of a corporation, was liable to assessment, during the life of the policy, although the property insured had been destroyed by fire before the assessment was made. *ib*

3. On the 8th of November, 1855, the board of trustees of the Atlas Mutual Insurance Company adopted a resolution "that a subscription in the sum of $400,000, in premium notes to be written against, be obtained; subscriptions to be binding when $300,000 is subscribed, *including the* $40,000 *already subscribed.*" In pursuance of this resolution, the trustees prepared and circulated a paper, for signatures, in these words: "We the subscribers hereby agree to give to the Atlas Mutual Insurance Company our notes in advance of premiums of insurance at six and twelve months, in equal amounts, for the sums set opposite our names respectively; it being understood that in consideration thereof the subscribers are to be allowed by the company, at the maturity of their notes, five per cent on the amount thereof. This subscription is towards the $400,000 subscription authorized by a resolution of the board of trustees of this date, and *is not to be binding until the sum of* $300,000 *is subscribed.*" The defendants subscribed to this paper, $1000, on the 8th of November; and on the same day, the trustees subscribed the sum of $50,000 to another paper, on the same conditions set forth in the above resolution, to be paid in cash or notes, at 30, 60, 90 days or four months, provided the sum of $300,000 should be subscribed *under that resolution.* The subscriptions, under the resolution of November 8, exclusive of the $40,000 and of the $50,000 subscriptions, amounted to only about $212,500. In an action to recover one-half of the defendant's subscription, the plaintiff claiming that the whole $300,000 had been subscribed, so as to make the defendant's subscription binding; *Held*, 1. That the several subscriptions must be deemed separate and independent engagements, varying in amounts, terms and conditions; and that neither the $40,000 nor the $50,000 subscriptions could be resorted to, to aid in fulfillment of the terms of that for $300,000, or as forming any part thereof. 2. That the resolution of the board of trustees, of November 8, declaring that the subscription was to be binding when $300,000 was subscribed, "*including the* $40,000 *already subscribed*," did not affect the rights of the defendants, or constitute any part of the contract. That the rights and liabilities of the defendants were limited and defined by the terms of their subscription only. 3. That the condition mentioned in the subscription paper, that $300,000 should be subscribed, must be complied with before the defendants could be made liable upon their subscription: and that, as the whole sum specified was not subscribed, independent of the $40,000 and $50,000

subscriptions, the action would not lie. 4. That the fair construction of the paper signed by the defendants was, that the same was not to be operative unless the entire sum of $300,000 should be subscribed thereto, on the same terms as were therein expressed, viz: in premium notes at six and twelve months, in equal amounts. *Berry* v. *Yates*, 199

1. A corporation, created for the purpose of engaging in the business of insurance, has no power to advance its moneys or obligations to sustain another corporation engaged in a similar or dissimilar business. *ib*

5. Accordingly *held*, that an insurance company was not authorized to subscribe to the capital stock of a mutual insurance company, and to agree to give its notes in advance for premiums on insurances to be subsequently effected. *ib*

6. The authority given to insurance companies, to re-insure policies or risks taken by them, in other companies, does not justify such subscriptions by them. *ib*

7. A subscription to the capital stock of an insurance company, made by a similar company, under an agreement between the two companies for a mutual exchange of notes to a specified amount, is void, as being a fraud upon the other subscribers. *ib*

8. Where parties have been induced to enter into contracts of insurance upon a fraudulent representation by the agents and officers of the company in regard to its capital, or pecuniary resources and ability, or any other matter which rightfully influenced them in the negotiation, they may be relieved against their contracts; but it not being necessary for their protection to go beyond that and declare the non-existence of the corporation, for any purpose, it should not be done. *Jones* v. *Dana*, 395

9. If the plaintiffs, in such a case, have shown the corporation to be acting under a charter or an authority apparently valid, and really so unless impeached by something outside of the record evidence of its corporate existence, and depending upon proof *aliunde*, and have thus furnished *prima facie* evidence of the incorporation, they cannot go behind that evidence, to show that the company was got up in fraud or mistake, or was irregularly brought into existence. *ib*

10. The determination of the commissioners appointed by the comptroller to make the necessary examination for that purpose, that an insurance company is in possession of the requisite capital and premium notes, is final, so far as the existence or non-existence of the corporation is concerned, until impeached and overthrown by a proceeding instituted by the people or their representatives, for that purpose. *ib*

11. The copies of the examiner's certificate and of the charter, when filed in the office of the county clerk, constitute the authority of the corporation to commence business and issue policies, and are the evidence of its right to act as a corporation. The courts, therefore, cannot, at the instance of third persons, go behind those acts and the prescribed evidence of them, for the purpose of determining as to the validity of the organization of the corporation. *ib*

12. A certificate of the examiners appointed by the comptroller, stating that the company has notes to the extent required by the 5th section of the statute, "given on application for insurance," is a substantial compliance with the 11th section of the statute. *ib*

INTERPLEADER.

A receiver, having a fund in his hands, realized from a sale of land, to which there are two claimants, each of whom has commenced a separate action against him in respect to that fund, and obtained an injunction to prevent him from paying it over, may bring an action, in the nature of a bill of interpleader, against the rival claimants, to compel them to interplead and settle their rights between themselves. *Winfield* v. *Bacon*, 153

J

JUSTICES' COURTS.

After books of account have been introduced in evidence, on a trial be-

fore a justice, they become the property of both parties, as evidence in the cause, and the party producing them cannot be allowed to withdraw them from the consideration of the jury, without the consent of the opposite party. *Clinton* v. *Rowland*, 634

See CONSTABLE.

L

LABORERS.

See CANALS.

LANDLORD AND TENANT.

1. The obligation of a lessee, for the payment of the rent reserved in the lease, and the obligation of a third person, who, by a separate instrument executed at the same time with the lease, guaranties the payment of the rent by the lessee, are separate and not joint, and will not support a joint action by the lessor, against the lessee and the guarantor. *Tibbits* v. *Percy*, 39

2. The obligation of the lessee is primary and absolute; and that of the guarantor secondary and conditional. *ib*

3. But if a misjoinder, of this description, is not objected to in the court below, the objection cannot be raised on appeal. *ib*

4. If the effect of a lease, by itself considered, would be to merge or supersede a prior agreement between the parties thereto, parol evidence that it was the understanding, at the time the lease was executed, that the prior agreement should be kept on foot and remain a subsisting contract, is inadmissible, as varying by parol the effect of the lease, and changing the rights of the parties under it. *ib*

5. The omission, by a lessor, to make repairs according to his agreement, will not release the lessee from the payment of rent. The remedy of the lessee, in such a case, is by action against the lessor, upon the covenant to repair. *ib*

6. The preliminary affidavit, in summary proceedings to recover the possession of demised premises, under the statute, must make out a plain case, and show the relation between the parties to be that of landlord and tenant. *Deuel* v. *Rust*, 438

7. The summons, besides describing the premises, should require the defendant forthwith to remove from the same, or show cause why possession of said premises should not be delivered to the applicant. It should also be directed to the tenant, by name. *ib*

8. An interruption of the enjoyment of a privilege conferred by a lease, by physical means adopted *by the landlord*, constitutes an eviction, and suspends the rent of the demised premises, and the remedy of the lessor, for the recovery of the possession. *Peck* v. *Hiler*, 178

9. Accordingly, where the use of a rail road, together with a rolling mill, furnace, &c., was leased to the defendant; such use being necessary to the full enjoyment of the premises; and rent was to be paid for such rail road, as an appurtenance of the other demised premises; and after the defendant had taken possession thereof, the lessor tore up the rails of the rail road, *it was held* that this amounted to an eviction of the tenant, which barred an action for the recovery of the possession of the premises on the ground of non-payment of rent. *ib*

10. *Held also*, that the fact of the tenant having recovered damages of the lessor, for the breach of the covenant for the use of the rail road, did not alter the case; the covenant being a continuing covenant. *ib*

See APPEAL.

LEASE.

1. B. leased to A. and I. certain premises, for brick making purposes, by lease, dated Jan. 25, 1853, "from the 1st day of April next, for and during and until the full end and term of five years," thence next ensuing, &c. yielding and paying therefor unto the lessor, yearly and every year, the yearly rent or sum of $4000, "in

equal quarter yearly payments, to wit, on the first days of April, July, October and January, in each and every year during the said term." The lease also contained a covenant on the part of the lessees, to the effect that they would at all times have and leave upon said yard, brick enough to secure one quarter's rent, and in case of default in the payment of such rent, the lessor was authorized either to re-enter and take possession of the premises, or to enter upon said yard and take therefrom, and sell at fair market prices, brick enough to pay the rent so in arrear and unpaid. *Held* that the term commenced on the 1st day of April, 1853, and included that day; and that the first quarter's rent was payable on that day, in advance. *Deyo* v. *Bleakley*, 9

2. *Held also*, that the rent for the quarter commencing October 1, 1854, and ending January, 1, 1855, was payable by the terms of the lease, on the first day of October, in advance; and that upon its remaining unpaid, the lessor was justified in entering upon the premises and selling brick enough to satisfy such rent. *ib*

3. Where a lease reserved to the grantor &c., "yearly and every year, the yearly rent of twenty-eight skipples of wheat and four fat fowls, *and perform* one day's service with carriage and horses, the *first* payment to be made on the 1st day of January," &c.; *Held*, that the fair construction of the whole sentence required that the words "yearly and every year," and the words "yearly rent," should be made applicable to the performance of the day's service as well as the other items of the rent. *Van Rensselaer* v. *Chadwick*, 333

4. The fact that a lease or grant was executed to two persons, jointly, will not in any way affect the liability of an individual as assignee of a part of the premises charged with the rent. *Van Rensselaer* v. *Gifford*, 349

5. If the grantees have made partition of the demised premises, between themselves, and a portion thereof has come to a third person, by descent or purchase, he is liable for the proportionate share of the rent chargeable thereon, as assignee of the lessee. *ib*

6. His liability is the same if he had purchased from both the grantees. Inasmuch as the covenant to pay the rent reserved in the lease runs with the land, it is enough to establish the liability of an assignee that he has, in some way, succeeded to the rights of the original grantees, in a part of the lot. How he acquired such rights is immaterial. *ib*

7. In order to sustain an action for rent, upon a lease in fee, against an assignee of the grantee, it is not requisite that the plaintiff should have a reversionary interest in the land, as in the case of landlord and tenant. It is enough that at the time of making the covenant an estate passed between the covenanting parties. *Van Rensselaer* v. *Bonesteel*, 365

8. Where the grantor, in a lease in fee, reserves to himself an annual profit issuing out of the land, of so many bushels of wheat, and with it a covenant obligatory upon the grantee and all who may succeed to his interest in the land, that this shall be paid, an assignee of the grantee takes his title to the land charged with the burden which the original grantee had annexed to it. *ib*

9. By taking the benefit of the grant, the assignee voluntarily assumes the liabilities of the original grantee in respect to the subject of the grant. *ib*

10. The assignee is not the less liable, because he is the assignee of only a part of the thing to which the covenant is annexed. He is liable to pay his proportionate part of the rent. *ib*

11. Where, in an action for rent, the complaint alleged that the grantor and covenantee, V. R., died on &c., seised of the rent in question; that by his will he devised this rent to W., whereupon and whereby he became seised of the rent, and that on &c., W. conveyed the rent to A. W. and others, and the latter conveyed the rent, and all arrears of rent, to the plaintiff; *Held*, that this was sufficient, not only to show that the plaintiff was entitled, as assignee of a chose in action, to sue for the rent due and unpaid at the time of the assignment to him, but that he was also the assignee of the covenant for the payment of the rent subsequently accruing. *ib*

12. The complaint in such a case need not allege that after the plaintiff became assignee of the rent, he continued to be the owner until the suit was commenced. In the absence of any allegation to the contrary, this is a legal presumption, and need not be alleged or proved. *ib*

13. In an action for rent, against an assignee of a portion of the demised premises, the owners of the other parts of the lot need not be made parties. After a partition, each owner becomes severally and independently liable for his proportionate share of the rent. *ib*

14. A lease was executed for a term commencing the 1st day of July, 1853, and ending the 1st day of July, 1855, "with the privilege of two years more, if desired," one month before the expiration of the period specified, at a certain yearly rent, to be paid monthly during the term, with a clause expressing that the lessees had hired and taken the premises "for the term and at the rent aforesaid," and that they agreed to pay the rent. *Held* that it was not contemplated by the parties that in case the lessees should desire the premises for the additional two years, a new lease should be made, embracing the further time; but that it was intended the present lease, on notice being given, should cover the whole period. And that the agreement to pay rent was co-extensive with the entire term of the lease, not only as it was originally fixed, but as it should be extended according to the provisions of the lease. *House* v. *Burr*, 525

15. And the lessees having, more than a month prior to the 1st of April, 1855, by writing on the back of the lease, assigned the same to other persons, after informing the lessor's agent that the assignees wanted the premises for the additional term, and obtaining his consent; it was *further held*, that this was a sufficient notice to effect the extension of the lease provided for. *ib*

16. *Held also*, that the lessees were liable for the rent for the month of April, 1855, notwithstanding their assignment of the lease; and that the consent of the lessor's agent to the assignment, did not discharge them from that liability. *ib*

17. *Held further*, that the transaction did not amount to a surrender of the lease, by the lessees, and the giving of a new lease to the assignees. *ib*

See LANDLORD AND TENANT, 4.
RENT CHARGE, 1.

LEGISLATURE.

1. Where a duty, in respect to a particular thing, is enjoined by the constitution upon the legislative branch of the government, and the mode of doing it is left exclusively to legislative discretion, even though the authority may have been previously exercised by the legislature, no limitation is thereby set to legislative power; nor can an intention be implied, on the part of the framers of the constitution, or the people who adopted it, to restrict the law-making department in the manner of discharging the duty. *Grant* v. *Courter*, 232

2. An act granting power, to be exercised upon such conditions as the legislature impose, is not a delegation of legislative authority, nor is it invalid. *ib*

3. All the inherent power of the people for self-government, not delegated to the general government, is reserved to, and belongs to, the state. *Clarke* v. *The City of Rochester*, 446

4. Of such reserved powers the entire legislative power is vested in the state legislature, subject to no restrictions or limitations except such as are contained in the state constitution. *ib*

5. The taxing power belongs to the legislature, and is subject to no limits or restrictions outside of the United States and state constitutions. *ib*

6. The power to authorize the construction of works of internal improvement, and to provide for their construction by the officers or agents of the state, rests with, and pertains to, the legislature, to be exercised within its exclusive jurisdiction. *ib*

7. The legislature is the exclusive judge in respect to what works are for the public benefit, and in regard to the expediency of constructing such

works, and as to the mode of their construction, whether by the state or by private or municipal corporations in whole or in part. *ib*

8 The legislature may authorize municipal corporations to subscribe to the stock of a rail road company, with the consent and approval of a majority of the corporators, duly ascertained. *ib*

9. The passage of a law authorizing such subscriptions to the stock of a private corporation, subject to the assent or approval of a municipal corporation, by the vote of the corporators, is not a delegation of power to the corporation to pass a law, but is a legitimate case of conditional legislation, and is entirely within the discretion of the legislature. *ib*

10. The legislature may, without violating the constitution, pass an act authorizing a foreign corporation to take lands, in this state, belonging to its citizens, and appropriate the same to its own use for the purpose of constructing a public improvement, on paying a just compensation to the owners. *The Morris Canal and Banking Co.* v. *Townsend*, 658

11. Accordingly *held*, that the act of April 11, 1855, authorizing the supreme court to appoint commissioners to ascertain and determine the compensation which ought justly to be paid by the Morris Canal and Banking Company, a corporation chartered by the legislature of New Jersey, to the owners of lands in this state taken by such corporation, or injured by them, in constructing a reservoir for their canal, was a valid and binding act; and that it was the duty of the court to appoint appraisers, upon a proper application by the corporation. *ib*

12. Whether the citizens of this state will be benefited by the construction of a public work by a foreign corporation is for the legislature to judge. To that department, and not to the judiciary, the constitution confides the right to determine that question. *ib*

13. It is also for the legislature, exclusively, to determine as to the extent of the interest in the lands, to be acquired by the company. The right to take property to any extent, whether the full or entire title, or only an easement, is implied in the constitutional provision. *ib*

14. The term "property," in the constitution, includes a right of action for injuries to land proposed to be taken for a public purpose; so that it may be included in an assessment, by commissioners, of the value of the land, without a violation of the right to a trial by jury. *ib*

M

MANDAMUS.

1. The statute having provided that if the president or other proper officer of a corporation named in an assessment roll shall show to the satisfaction of the board of supervisors, at their annual meeting, by affidavit, that such corporation is not in the receipt of any profits or income, the name of such corporation shall be stricken out of the assessment roll, and no tax shall be imposed upon it; and that the assessment of any corporation from which no such affidavit shall be received shall be *conclusive evidence* that such corporation was liable to taxation and was duly assessed, if the officers of a corporation whose property has been assessed neglect to furnish the affidavit mentioned in the statute, at the proper time, a *mandamus* will not be issued, directing the supervisors to erase the name of the corporation from the assessment roll. *The Colonial Life Assurance Society* v. *The Board of Supervisors of New York*, 166

2. After taxes have been assessed, and warrants issued and delivered to the collectors, the supervisors have no further control over the assessment roll; their power being spent. Consequently a mandamus, directing them to strike any particular name from the roll would be nugatory. *ib*

3. Where an alternative mandamus is issued, and the defendants make their return, and the relators, instead of demurring thereto, plead, taking issue upon all the material allegations in the return, they thereby admit that, upon its face, the re-

turn is a sufficient answer to the case made by the alternative writ. And if no material fact stated in the return is disproved upon the trial, the defendants will be entitled to a verdict in their favor. *The People, ex rel. Kipp*, v. *Finger*, 341

See COMMISSIONERS OF HIGHWAYS, 3. MEDICAL SOCIETIES, 3.

MASTER AND SERVANT.

1. The only principle upon which one man can be made liable for the wrongful acts of another is, that such a relation exists between them that the former, whether he be called principal or master, is bound to control the conduct of the latter, whether he be agent or servant. *Blackwell* v. *Wiswall*, 355

2. The maxim of the law is *respondeat superior*. It is only applicable in cases where the party sought to be charged stands in the relation of *superior* to the person whose wrongful act is the ground of complaint. *ib*

3. Where the defendant, who had obtained from the proper authority an exclusive right and license to run a skiff ferry across a river, permitted another person, called a lessee, to exercise the right, not as the defendant's agent or servant or for his benefit, but on his own account, and owing to the negligent and unskillful conduct of the man rowing and having charge of the skiff, the same was sunk or swamped, and the plaintiff's intestate was drowned; *it was held*, that whether the person exercising the right of ferrying under the defendant's license was the same man who was rowing and had charge of the skiff, or his employer, the relation of superior and subordinate did not exist between him and the defendant. And that before the defendant could be made liable for the negligence or unskillfulness of the person having charge of the boat, it must appear that the relation of master and servant existed between them. *ib*

4. *Held also*, that although, as between the defendant and the government, he might have been guilty of a breach of duty when he made the contract to lease the ferry to another yet that such breach was not, *per se* a wrongful act for which an action would lie, in favor of a stranger That it would still be necessary to show, in order to maintain an action founded upon the mere fact that the defendant had thus leased the ferry, that by this very act he had been guilty of a wrong which had resulted in injury to the plaintiff. *ib*

MEDICAL SOCIETIES.

1. The power given, by statute, to medical societies, to make by-laws and regulations relative to the admission and expulsion of members, although conferred in general terms, is not an arbitrary, unlimited power. The by-laws, rules and regulations are not to be contrary to, nor inconsistent with, the laws of the state. *The People, ex rel Gray*, v. *The Medical Society of the County of Erie*, 570

2. A by-law must be reasonable, and adapted to the purposes of the corporation. *ib*

3. Where a medical society established a tariff of fees, for medical services to be performed by its members, and fixed a minimum salary to be received by any member who should be appointed to any public office, in a professional capacity, and adopted a resolution declaring that it should be dishonorable for any member of the society to accept any appointment or perform any services contained in such tariff of prices, at a less sum than was therein specified; and subsequently, in pursuance of a by-law to that effect, expelled a member for a violation of this regulation; *Held* that the regulation was void, as being unreasonable, and against public policy, and contrary to law; that the expulsion of the member was unauthorized and illegal; and that a mandamus would lie directing that he be restored, or recognized as a member of the medical society. *ib*

MORRIS CANAL AND BANKING COMPANY.

See LEGISLATURE, 10, 11

MORTGAGE.

1. Where, upon the sale of a piece of land, the purchaser gives a mortgage thereon, to the vendor, for a part of the purchase money, which mortgage describes the land as a single lot or tract, and the mortgagor subsequently runs streets through the land and lays it out in blocks and lots, with the design of selling them for village or town purposes, and causes a map thereof to be made, and sells some of the lots, a judgment creditor of the mortgagor upon a foreclosure of the mortgage, has no right to insist that the mortgagee shall sell the premises in lots, according to the map, instead of selling the whole as one undivided tract, by the description contained in the mortgage. *Griswold* v. *Fowler*, 135

2. Nor will the court direct the premises to be sold in parcels, in such a case, as a favor, or on terms, where it appears that the mortgagees have offered to consent to a sale in parcels upon the giving of security against loss thereon, to the amount of only one third of their debt. *ib*

3. By the terms of a mortgage the whole of the mortgaged premises are pledged for the payment of the mortgage debt; and the contract of the parties is that, in case of non-payment, the whole shall be sold. The mortgagor, therefore, cannot, by laying out the mortgaged premises into town lots, bounded upon and intersected by streets, withdraw from the lien of the mortgage the land included in the streets. *ib*

4. A subsequent incumbrancer who looks at the record is entitled to all the information which the parties to a mortgage can reasonably impart. He is entitled to know the real extent or amount of the debt which the mortgage is given to secure. *Youngs* v. *Wilson*, 510

5. A mortgage given to save harmless and indemnify the mortgagees, and each of them, of and from all liabilities which they or either of them had at any time theretofore contracted to and for the mortgagor "either as surety, indorser, guarantor or otherwise, whether now due or yet to grow due, and from all damages, costs and charges on account of the same," is fraudulent and void as against creditors, for its vagueness and uncertainty in respect to the debt or debts it is intended to secure. *ib*

N

NEGLIGENCE.

See INNKEEPERS.
MASTER AND SERVANT.

NUISANCE.

In an action against the continuator of a private nuisance originally erected by another, to recover damages for the injury sustained thereby, the plaintiff must prove a notice to the defendant, of its existence, and a request to remove it. *Hubbard* v. *Russell*, 404

NEW YORK, (CITY OF.)

1. The corporation of the city of New York, by its charter and the powers conferred upon it by the legislature, has the right to regulate the uses of the basins and slips in the city; and its regulations are binding upon all, provided they do not interfere with the rights of the owners to receive and collect their wharfage. *Hecker* v. *The New York Balance Dock Company*, 215

2. Subject to this right, the corporation may direct the use of any particular slip or wharf to be appropriated exclusively for any particular craft or class of vessels; and in reference to its own wharves and piers, may grant the exclusive use to any person, for any particular craft or class of vessels, and may do the same, with the consent of those entitled to wharfage, in reference to any basin, slip or pier. *ib*

3. The general authority of the state and city governments, in reference to the locating of ships and vessels, and the uses of the wharves, piers and slips, is exercised through the dock masters, as to the public or corporation basins, piers and wharves,

and through the harbor master, as to private basins, piers and wharves. *ib*

4. The jurisdiction of those public officers is co-extensive with every legal and legitimate use of the basins, piers and wharves. *ib*

5. The occupation of basins and slips by a balance dock, for the repairing of vessels, is an occupation for a lawful and legitimate commercial purpose; and if sanctioned by the proper officers, and assented to by the owners of the piers and bulkheads, and under lease from those who are entitled to collect and receive the wharfage and cranage from the premises occupied, no other person has a right to complain of such occupation, or to restrain the same by injunction. *ib*

3. By the charter of the city of New York the counsel for the corporation is to have charge of, and conduct, not only all the law business of the corporation, but all the law business of the several departments of the corporation, and all other law business in which the city shall be interested. *Ramson* v. *The Mayor &c. of New York*, 226

7. For the performance of the duties of his office, a compensation is provided, and he is bound to attend, personally, to all the law business of the corporation and of its several departments; and there is no power in the common council, or any of its committees, to withdraw business of that nature from his hands and confide it to other persons. *ib*

8. Accordingly, where the board of aldermen appointed a committee to conduct an investigation into the affairs of the police department, and during its progress several witnesses declined answering questions put to them by the committee, and the committee instituted legal proceedings to compel them to answer, and employed counsel to conduct such proceedings, instead of applying to the counsel for the corporation, who was ready and able to do so to manage the same; *it was held* that the corporation was not liable to pay the counsel thus employed, for their services. *ib*

O

OFFICE AND OFFICER.

1. Where the act of an officer is of such a nature that his office gives him no authority to do it, he is not protected by the section of the statute which requires suits against him to be brought in his own county; but where, in performing an act within the scope of his authority he commits an error, or even abuses the confidence which the law reposes in him, he is still entitled to the protection of the statute. *Brown* v. *Smith*, 419

2. To authorize an application under the statute (1 *R. S.* 125, § 56) for an order to compel the delivery of books and papers appertaining to a public office, it is sufficient that the applicant is in possession of the office, with color of title. *Matter of Conover* v. *Devlin*, 587

3. Upon such an application, the court will not decide the question of title to the office. If there is a reasonable doubt as to who is entitled to it, it must be determined on a direct proceeding for the purpose, by action of *quo warranto*. *ib*

4. As the title to the books and papers must ultimately depend on the title to the office, so the right to present possession depends on the fact of present possession of the office to which they are appurtenant. *ib*

5. Where an office becomes vacant, and an individual, with claim and color of title, enters it and assumes the duties thereof, he is to be considered the officer *de facto*, and in possession of the office. And the fact that he has been forcibly removed from the rooms occupied for the transaction of the business of the office, and from the presence of the property pertaining to it, will not affect his legal rights. *ib*

6. Nor will the fact that a deputy of the former incumbent refuses to yield to the person claiming to be appointed to fill the vacancy, possession of the books and papers, and continues himself to transact the business of the office as such deputy, affect the

rights of the claimant, or his possession. *ib*

See CERTIORARI, 3.
INJUNCTION, 5.

P

PARENT AND CHILD.

1. The general doctrine that the right of a father to the custody of his minor children is paramount to that of the mother, is well settled. *The People, ex rel. Rhoades*, v. *Humphreys*, 521

2. He may forfeit that right by misconduct, or lose it by disqualification, and it may be suspended by reason of the tender age of the child and its welfare requiring that it be with the mother. But a strong case must exist, to warrant the depriving him of this right, even for a limited period. *ib*

3. Where the wife has separated from her husband without any sufficient excuse, she ought not to have the custody of her child, unless the health and present condition of the child imperatively require it. *ib*

4. A father is not liable for articles of clothing furnished to his minor child without his consent, in the absence of any proof that he had neglected to supply such child with clothing necessary and proper for his condition in life. *Clinton* v. *Rowland*, 634

See COUNTY JUDGE.

PARTIES.

See EXECUTORS AND ADMINISTRATORS.
LEASE, 13.

PARTNERSHIP.

When a special partnership becomes insolvent, and application is made by creditors for an injunction and receiver, a special partner is entitled to come in and claim as a creditor of the partnership, and to receive a dividend out of the assets thereof, *pro rata* with the other creditors. *White* v. *Hackett*, 290

PLEADING.

1. The duty of a treasurer is to keep the moneys of his principal distinct from his own, unless it is otherwise agreed, and to pay any balance due, on demand. *The Second Avenue Rail Road Co.* v. *Coleman*, 300

2. And even if it be the rule that he cannot be indebted until a demand be made of him, an allegation in the complaint, that *he is indebted*, with a statement of the items of moneys received by him, is an allegation that all that is essential to *make him indebted* has been done; and consequently that a demand has been made. *ib*

3. In such a case, the summons is a sufficient demand; and the averment of demand is sufficient, on demurrer. *ib*

4. Although, under the code, the allegations of the complaint, not specifically denied, are to be regarded as admitted, yet where there are several answers, an admission made in one is not available against the others. Each answer must stand by itself as a complete defense, and the plaintiff must recover upon the whole record. *Swift* v *Kingsley*, 415

5. An implied admission, in one of several answers, therefore, will not conclude the defendant, or estop him from showing the matters of defense set up in another answer. *ib*

PRINCIPAL AND AGENT.

1. The declarations of an agent may be proved, as binding upon his principal, only when they constitute a part of the *res gestæ*. *Budlong* v *Van Nostrand*, 25

2. The admission or declaration of the agent, in order to bind the principal, must accompany, and relate to, some authorized act of the agent, *et dum fervet opus*. *ib*

3. If made after the time for the performance of a contract has expired, and after the rights of the parties have become fixed, and the duties

of the agent, as such, are at an end, they will not bind the principal. *ib*

See BILLS OF EXCHANGE, &c. 9.
CORPORATION, 1.
PLEADING, 1.

PRINCIPAL AND SURETY.

If a surety knows that a claim made by a creditor of his principal is just, he has no right to interpose a defense to a suit brought against him as surety, and litigate the same. If he does so, and fails in the suit, he cannot recover of his principal the costs paid by him. He is only entitled to recover the costs of a judgment by default. *Holmes* v. *Weed*, 546

R

RAIL ROADS.

See CANALS.
LEGISLATURE, 8.

RAIL ROAD COMPANIES.

1. *Liability of stockholders.*

1. The responsibility of the stockholders of a rail road corporation, for the debts of the company, under the 10th section of the general rail road act of 1850, was an original responsibility, and was that of general partners. Like the responsibility of partners, it entered into the essence of every credit given to the company, and was a part of the contract by which the debt was incurred. And the credit was given, and the creditor trusted, as well to the personal liability of the stockholders, as to the responsibility of the corporation. *Conant* v. *Van Schaick*, 87

2. But it was the intention of the legislature, by the 10th section of the act of April 15, 1854, amending the act of 1850, to repeal the provisions of the 10th section of the act amended. As respects debts contracted since the passage of the amendment, the stockholders are *corporators* merely, and not *partners;* and as to such debts, an action cannot be maintained against them, by a creditor, after the return of an execution, issued against the company, unsatisfied, to render them personally liable. *ib*

3. The repealing clause, however, of the act of 1854, so far as it relates to rights of action existing at the time it was passed, was unconstitutional, as interfering with vested rights; and those rights remain untouched by it. *ib*

4. In an action by a judgment creditor of a rail road company, against stockholders, to enforce their personal liability, the mere proof that a judgment has been obtained by the plaintiff, against the company, and an execution returned unsatisfied, is not enough. The plaintiff must also prove that the debt, for which the judgment was recovered was of the sort named in the statute. And when this is done, the amount due on the execution is the rule of damages. *ib*

5. Such actions may be brought by all persons employed in the service of the company—whether as engineers, master mechanics or conductors—who have not a distinctive appellation, such as *officers* or *agents* of the company. The servant who employs and pays the man working with him, is entitled to the benefit of the maxim, *qui facit per alium facit per se.* *ib*

6. A rail road corporation formed under the general rail road act, is not formed, and does not become a legal body, until all the requirements of the statute have been complied with, and the articles filed in the office of the secretary of state. *Burt* v. *Farrar*, 518

7. Until this has been done, the subscription of any person to the articles is a mere proposition to take the number of shares specified, of the capital stock of the corporation thereafter to be formed, and not a binding promise to take and pay. *ib*

8. As an obligation it is inchoate, and can never become of any force or effect unless the articles are filed and the corporation created. *ib*

9. While the articles remain in the hands of a subscriber, before being filed, he may erase his subscription, entirely, or modify it as he sees fit. *ib*

2 *Liability as carriers.*

12. Where a rail road company receives, for transportation, property addressed to a person at a point beyond the terminus of its road, it will be understood, in the absence of any proof to the contrary, to have agreed to deliver the property, in the same order and condition in which it was received, to the consignee. *Foy* v. *The Troy and Boston Rail Road Company*, 382

11. It is not the duty of the owner, in case of injury or damage to the property, to inquire how many different corporations make up the entire lien of road between the place of shipment and the place of delivery; or, having ascertained this, to determine, at his peril, which of such corporations has been guilty of the negligence which occasioned the injury. *ib*

12. If a rail road company receiving freight for transportation, intends to limits its liability to injuries occurring upon its own road, it should provide for such limitation, in its contract. *ib*

13. The possession of a rail road passage ticket is *prima facie* evidence that the holder has paid the regular price for it, and of his right to be transported, at some time, between the places specified thereon, on some passenger train. And if it is unmutilated, the presumption is, that it has never been used for that purpose. It is therefore evidence of the agreement or undertaking of the corporation to transport the holder to the place mentioned, on its passenger cars, for a consideration by him paid. *Pier* v. *Finch*, 514

14. The words "*good this trip only*," upon a passage ticket, will not limit the undertaking of the company to any particular day, or any specific train of cars. They do not relate to *time*, but to a *journey*; and if the ticket has not been previously used, it entitles the holder to a passage on a subsequent day, as well as on the day it bears date. *ib*

See Constable, 4.
Constitutional Law, 10.
Damages, 2, 3, 4.
Stock, 2.

RECEIPT.

See Stock, 2.

RECEIVER.

1. A receiver who has obtained authority from the court to sue, is not only authorized but bound to proceed with his action, and he is not to be restrained by injunction out of another court, or by making him a party to a new action and obtaining an injunction against him. *Winfield* v. *Bacon*. 154

2. The proper method of restraining him when engaged in the discharge of his official trust, is by application to the court whose officer he is, for instructions. *ib*

3. As a general rule, a defendant who has an equitable defense to an action, being now authorized to set it up by answer, is bound to do so, and he will not be permitted to bring a separate action merely for the purpose of restraining the prosecution of another action pending in the same court. *ib*

4. Nor can one court, in this state, rightfully enjoin a defendant from proceeding in a suit in another court of the state, having equal power to grant the relief sought by the complaint. *ib*

See Interpleader.

RENT.

See Covenant.
Lease, 1, 2, 3.

RENT CHARGE.

1. The rent reserved in the manor leases which exist in this state is a rent charge. The *dictum* to the contrary, in *Van Rensselaer* v *Bradley*, (3 *Denio*, 135,) is not sustained by authority. *Van Rensselaer* v. *Chadwick*, 333

2. Where several persons, being the owners of land chargeable with rent, as tenants in common, make partition between themselves, each as-

suming the payment of his equitable share of the rent, a release to one of the owners does not extinguish the liability of the other. *ib*

5. Thus, where lands, charged with the payment of the rents reserved in the original leases, descended to the defendant and his brother J. C., from their father, the lessee, and they made partition between themselves, each conveying to the other, and each agreeing to assume and pay his equitable proportion of the rents; *Held* that the land of each was still liable for the rent, but that, as between themselves, each was liable to the other for any amount he was compelled to pay, beyond his proportionate share. *ib*

4. And the lessor having, subsequent to such partition, and apportionment of the rent, executed a release to J. C. of all his estate and interest in the portion of the premises conveyed to J. C. on the partition; it was *further held* that the lessor, by the execution of that release, made himself a party to the partition, and became bound by the apportionment that had been made; and that he could no longer claim from the defendant the payment of any greater amount of rent than by the contract for partition between him and J. C he had agreed to pay. *ib*

5. *Also held* that there was no rule of law which would give to such a transaction the effect of exonerating the defendant, or his land, from the payment of his proportionate share of the rent. *ib*

6. No case is to be found in which rent, though it be a rent charge, if in its nature it be divisible and apportionable, has been held to have been extinguished as to the tenant of one parcel of the land, by a release to another tenant of a different parcel held by him in severalty. *Per* HARRIS, J. *ib*

7. Where several persons, being the owners of land chargeable with rent, as tenants in common, make partition between themselves, each assuming the payment of his equitable share of the rent, the purchase of a portion of the land, by the owner of the rent, will not extinguish the liability of the person owning the other portion of the premises. *Van Rensselaer* v. *Gifford*, 349

8. After a contract has been entered into, between the tenants, for the severance of their interests, each is at liberty to deal with the lessor as he may see fit, without reference to the other, and to extinguish his liability, either by a release or a sale. *ib*

9. The lessor may make himself a party to such an agreement, as well by purchasing the land of one of the tenants and thus extinguishing the rent by merger, as by a release. *ib*

10. No dealing between the owner of the rent and the owner of a part of the land, thus held in severalty, can affect either the rights or the liability of the owner of the residue. *ib*

11. Evidence that a person occupying a portion of premises originally leased to several persons jointly, has settled with the lessor for the rent due upon that part of the demised premises occupied by him, is, in the absence of any proof to the contrary, sufficient to justify the inference that a division of the lands has been made between the different owners, and that they have, by contract, made an apportionment of the rent between themselves. *ib*

12. A rent payable in fowls and service with carriage and horses is not, in its nature, indivisible, or incapable of being apportioned. *ib*

13. Where the owners of land chargeable with rent which cannot be apportioned, make a partition between themselves, each becomes liable for the whole rent; *it seems*. *ib*

RIGHT OF WAY.

In an action for obstructing a right of way, the plaintiff is not to be limited to the recovery of nominal damages *Smiles* v. *Hastings*, 44

See EASEMENT.

ROCHESTER, (CITY OF.)

1. The act to amend the charter of the city of Rochester, passed July 5, 1851

including the sections 285 to 291 inclusive, was a valid law immediately upon its passage and the signature of the governor thereto; and the provision therein that those sections should not take effect until approved by the corporation, merely suspended the power of the common council to act upon said sections until such approval. JOHNSON, J. dissented. *Clarke* v. *The City of Rochester*, 446

2 The acts of the city of Rochester, in subscribing for the stock of the Genesee Valley Rail Road Company, and in issuing the bonds of the city to pay for such stock, were legal and valid acts; and the city was entitled to take and hold such stock, or to sell it to individuals as valid stock, and is bound to pay the bonds so issued. And a purchaser of such stock cannot have his contract of purchase rescinded, on the ground of its invalidity. *ib*

S

SEDUCTION.

1 In an action by a father, for the seduction of his daughter, an agreement in writing between the defendant and the daughter, by which the defendant admits the seduction, and agrees to pay her a sum of money, and the daughter releases and discharges him from all actions for damages, and claims of every kind, is admissible in evidence, not for the purpose of showing the extent of the injury which the defendant has inflicted on the plaintiff, or the amount of damages to which the latter is entitled, but as an admission by the defendant of the facts necessary to be proved by the plaintiff, in order to maintain the action. S. B. STRONG, J., dissented. *Travis* v. *Barger*, 614

2. An action cannot be maintained, by a father, for the seduction of his daughter, if his own wrongful act, or omission, co-operated with the misconduct of the defendant, to produce the damages sustained. *ib*

3 Proof that the plaintiff knew of the improper intercourse between his daughter and the defendant, when it took place, and did not interfere to prevent it; or that he connived at the intercourse, and consented to his daughter and the defendant being together and having such intercourse, after it came to his knowledge, is a bar to an action by the father, for the seduction of his daughter, *per quod servitium amisit*. *ib*

4. But if those facts are not set up in the answer, as a defense, nor offered in mitigation of damages, but are offered to be proved on the ground that they will furnish a complete defense to the action, the evidence is inadmissible. S. B. STRONG, J., dissented. *it*

5. Where, in an action for seduction, the jury found a verdict for the plaintiff for $3000, the court refused to grant a new trial on the ground of excessiveness of damages. *it*

SERVITUDE.

See EASEMENT.

SHERIFF.

What will amount to a permission, from the plaintiff's attorney, to a sheriff, to retain an execution in his hands beyond the return day, for the purpose of endeavoring to collect the amount; so as to afford a justification to the sheriff for omitting to collect the debt and return the execution within the time limited by law. *Humphrey* v. *Hathorn*, 278

See DAMAGES.

STOCK.

1. A person selling stock to be delivered at a future day, may recover the price, upon a tender to the purchaser of the certificates of stock, with a power of attorney to transfer the same, and demand and refusal of payment, without an actual transfer of the stock into the name of the purchaser; where the purchaser, at the time of the tender, makes no objection for want of a transfer, but rejects the stock altogether, and refuses payment on any terms. *Mann* v *Barnum*, 283

2. On the 1st of October, 1851, R. & G. L. S held, by assignment from L., the person named therein, a receipt or certificate in these words: "Office of Illinois Central R. R. Co., New York, May 1, 1851. Received of T. W. L. $7500 advanced to the Illinois Central Rail Road Company, and to be repaid to him or his order, with interest at the rate of six per cent per annum, on demand, or received in payment ten dollars on each share of the capital stock of said company, to be issued to him or his assigns, whenever the directors shall authorize the issue of the second million of the stock, under the provisions of a resolution of the board of directors, passed on the 17th day of April, 1851. M. K., Treas'r Ill. C. R. R. Co." This receipt was assigned to the plaintiff by R. & G. L. S., on the said 1st of October, by an indorsement thereon, "together with the right to take and receive to his own use and account 150 shares of the stock to be issued as set forth in the receipt," the assignors reserving the remainder of the stock for their own use and account. On the same day R. & G. L. S. made and delivered to the plaintiff their promissory note of that date, for $7000, payable in six months, with interest, which recited that the makers had deposited with the payee, with authority to collect, sell or assign the same, the receipt or certificate above mentioned. On the 3d of April, 1852, R. & G. L. S. executed and delivered to the plaintiff another note, of that date, for the same amount and of the same tenor as the first, reciting the delivery of the script for the same purpose, and with the same authority to the plaintiff to collect, sell or assign the same. They at the same time indorsed on the receipt or certificate, the following: "For value received, we hereby assign and transfer to W. S. M. the right to take a further 150 shares of the stock within mentioned, when the same is issued, making in all 300 shares which are to be delivered to him." On the 6th of October, 1852, R. & G. L. S. gave to the plaintiff another note for $7000, payable in ninety days, which recited that they had deposited the said certificate with the plaintiff as "collateral security," with authority to sell the same on the non-performance of said promise. The two latter notes were renewals or extensions of the loan of $7000 made at the date of the first, and at the time of the trial had been paid and were in the possession of the makers. The second million of stock was afterwards issued by the company, and the 750 shares were issued to R. S. on the receipt, and 300 shares were delivered to the plaintiff by him, and the certificate was surrendered to the company. On the 17th of November, 1852, the company resolved to issue 70,722 additional shares, and determined to whom they should be issued, and in what number to each person. No part of the new stock was allotted to the plaintiff, as owner of the 300 shares. If the 70,722 new shares had been distributed to the previous holders of stock in proportion to their shares, there would have fallen to the plaintiff, as holder of the 300 shares, 562 shares of the new. The plaintiff claimed that he was entitled to the 562 new shares as an accretion upon the 300 old shares. He had no knowledge of the issue or allotment of the new stock, at the time, nor until after the receipt of his 300 shares, on the 23d of December 1852. R. S. was the president of the company, and controlled all its operations, and the plaintiff alleged that R. & G. L. S. intentionally kept him in ignorance of the allotment, and of his rights, and by that means, and their control over the company, secured to themselves the whole of the new stock allotted to the 300 shares so held by him, and caused the same to be issued to them, and claimed to hold it, which new stock was worth a premium of $35 per share. *Held*, 1. That the original receipt of the treasurer gave to the person named therein, or the holders, only the right to take the 750 shares at their option, and the holders of that receipt could not, by virtue of it, claim to be holders of the stock mentioned in it, or to have any right thereto, until they had elected and given notice of their intention to take it. That the plaintiff, therefore, until he had done this, had no right to the stock, either as between him and his assignors, or as between him and the company. 2. That the rights of the plaintiff must depend upon the state of things existing at the time the new stock

was created and issued; and that, not being at that time, the owner of the 300 shares of stock, and not becoming such owner by electing to take the same, until more than a month afterwards, he had none of the rights of a stockholder, in respect to the new issue of stock. 3. That the ownership of the 300 shares did not necessarily, nor so far as the evidence showed, entitle the holder to the 562 shares of new stock, and a distribution of the same to him. 4. That if, as between the plaintiff and R. & G. L. S. the former had been entitled to the 562 shares of new stock, the company, not having any notice of his rights, were not bound by them. 5. That although certain information came to R. S. the president of the rail road company, casually, while acting as agent of R. & G. L. S., that that firm had contracted conditionally to sell to the plaintiff some stock of the company, if given, without any intimation that it was intended or designed to give notice to him, or the company, or that he, as president, or the company as his principal, should take notice of it or regard it, or the rights or claims of the plaintiff, such information, thus received, did not bind the company as notice. 6. That the surrender of the receipt or certificate, to the company, with the indorsements thereon, made after the new stock was created, and the mode of its distribution resolved upon and carried out by the company, was no notice to the company of the plaintiff's rights. ROOSEVELT, J., dissented. *Miller* v. *The Illinois Central Rail Road Co.* 312

See BILLS OF EXCHANGE &c. 7, 8.

SURROGATE.

1. The statute which recognizes the right of a creditor to call for an account by an executor or administrator, and gives to the surrogate the power to decree the payment of a debt, or any part of it, is to be understood as applying to *undisputed* debts. *Disosway* v. *The Bank of Washington*, 60

2. The statute nowhere, in express terms, confers upon the surrogate the power to adjudicate upon the existence, validity or amount of a debt claimed against the estate of a decedent, upon a final settlement, where the debt claimed is disputed by the executor or administrator. And a surrogate should not assume the exercise of such power by inference or implication. *ib*

3. The legislature intended that jurisdiction over those questions should remain exclusively in the courts of common law and equity, where it appropriately belongs. *ib*

4. Previous to the act of 1850, "for the protection of purchasers of real estate upon sales by order of surrogates," the *onus* of proving that the surrogate had jurisdiction of the subject matter, and of the persons interested in the property, was upon those claiming title through the proceedings before the surrogate and the sale. But since the act of 1850, the *onus probandi* is upon those who claim in opposition to a sale had under an order of the surrogate, to show that no guardians were appointed, by the surrogate, for infant owners. *Chandler* v. *Northrop*, 129

5. The legislature, by the act of 1850, intended to include all sales which had been previously made, by order of surrogates, pursuant to the provisions of the original act, and which provisions are contained in the revision of such act. Sales made prior to the enactment of the revised statutes, and under the revised laws of 1813, were therefore embraced. *ib*

6. The act of 1850 was not unconstitutional, as applied to sales of property made before the passage of the act; no vested right being thereby impaired or changed, but merely a rule of evidence. *ib*

T

TAXES AND TAXATION.

See INJUNCTION, 3, 4.
MANDAMUS, 1, 2.

TRADE-MARKS.

See INJUNCTION, 2.

TRIAL.

1. The admission of leading questions, in the examination of a witness, is always in the discretion of the court, subject, however, to be reviewed, and will not be regarded as error unless the discretion has been abused. *Budlong* v. *Van Nostrand*, 25

2. A witness will not be allowed to testify as to a conversation in which a previous witness was engaged, for the purpose of impeaching him, unless such previous witness has been first interrogated upon the subject of that conversation. *ib*

3. Where, upon the trial of a cause, objectionable testimony is given, in answer to a question which is not objected to, and which does not necessarily call for any such evidence, and the judge immediately declares the testimony inadmissible, and in his charge to the jury directs them to disregard it, the giving of such testimony affords no ground for granting a new trial. *Travis* v. *Barger*, 614

4. Where matters offered in evidence by the defendant furnish a complete bar to the plaintiff's action, they must be pleaded. If, however, instead of being a complete defense, they go only to the extent of his recovery—to the amount of his damages—they may be given in evidence without having been pleaded. *ib*

5. Where evidence, offered to be given, as a defense to the action, is excluded by the judge, on the ground that it is not warranted by the pleadings, the party should offer it again, in mitigation of damages, if he wishes to avail himself of it, for that purpose. *ib*

TROVER.

1. Where the cause of action alleged in a complaint, is one accruing to the plaintiff by the unlawful conversion of property when he was the owner of it, and not one which accrued to a former owner of the property, by a conversion during his ownerhsip, and which has been assigned to the plaintiff, the plaintiff cannot avail himself of a conversion by the defendant while another person was the owner, and before the sale of the property by him to the plaintiff. *Bowman* v. *Eaton*, 528

2. A refusal to comply with a demand is only evidence of a conversion where an ability, at the time, to comply with it, is proved. *ib*

3. A demand of property, after the sale thereof to the plaintiff by the former owner, and the disclaimer, by the person of whom the demand is made, of any knowledge of the property, and his omission to deliver it, it having been previously lost or stolen, and he not having possession thereof at the time, is not evidence of a conversion. *ib*

U

USURY.

See AMENDMENT, 1.

W

WARRANTY.

1. To sustain an action upon a warranty, it is not necessary that all the representations made by the defendant should be false, or all actionable. If any part of the representations are actionable, it will suffice. *Sweet* v. *Bradley*, 549

2. Where a partner, upon selling promissory notes belonging to the firm, and for their benefit, stated to the purchaser that he would warrant them to be good notes, and they would be paid; that they were given for a valuable consideration, and were regular business paper; that the makers were responsible, and worth $40,000 or $50,000, and the indorser worth $25,000; which representations were false, and the makers insolvent; *Held* that the firm was bound by the representations made by the partner on selling the notes; and that an action would lie against all the members of the firm, upon the warranty. *ib*

3. A positive affirmation of a fact is a sufficient warranty. *ib*

4. An affirmation in regard to an existing fact, distinctly and positively made, in negotiations for trade, should be regarded as a contract, and enforced as a warranty. *ib*

5. In an action brought upon a warranty by an assignee, the measure of damages is the sum which the assignor might have recovered, had the action been brought in his name. The amount paid by the assignee, for the right of action, is not the rule. The warrantor must make good his warranty. *ib*

WILL.

1. To avoid a will, on the ground of the mental disability of the testator, it is not enough that the testator may at some former period have been laboring under some disability; but the question is, had he the capacity to make a will at the time of the execution of the instrument. *Brown* v. *Torrey*, 583

2. Until the contrary appears, sanity is to be presumed: and where an act is sought to be avoided on the ground of mental disability, the burden of proof is on the party who alleges the disability. *ib*

3. A testator who died in 1853, aged 78 years, had for some years previous to the execution of his will, in 1843, been subject to occasional fits of epilepsy which, for the time being, produced great physical prostration, and for a season enfeebled his mental energies, and impaired his power of memory. For many years he had been in the habit of taking large doses of laudanum, to relieve his sufferings. At times he was childish, and incapable of much effort of any kind, and failed, on a few occasions, to recognize his intimate acquaintances. On the other hand it was shown by several witnesses that he gave directions in regard to his affairs, made bargains, and transacted business, and was consulted by his neighbors for the last 8 or 10 years of his life, and down to within a year or two of his death, and was esteemed a man of sound judgment and good business capacity. And it was shown by the testimony of the attorney who drew the will and the first codicil, and was present when they were executed, and by the person who drew the last two codicils and witnessed their execution, in 1847 and 1849, that on all those occasions the testator was apparently in the perfect possession of his faculties, and fully apprehended the nature of the business he was transacting, and avowed distinctly that the testamentary dispositions he then made were in precise accordance with his views and intentions. *Held* that the testator had sufficient mental capacity to dispose of his property by will; and the decree of the surrogate, admitting the will and codicils to probate, was affirmed. *ib*

4. In all cases of doubt, such a construction should be given to a will as to make the minor and subordinate parts agree with the main design. *Ash* v. *Coleman*, 645

5. A testatrix devised certain real and leasehold property to the two children of her nephew Thomas Ash, viz: Mary E. Ash and Thomas F. Ash, their heirs and assigns; to have and to hold the same unto the said Mary E. and Thomas F. their heirs and assigns forever, to be equally divided between them, share and share alike. And in case of the death of either of them, then to the survivor of them and his or her heirs and assigns. And *in case* of the death of both of them before they should arrive at lawful age, then the testatrix gave and devised the property to her nephew, the said Thomas Ash, his heirs and assigns forever. The devisees survived the testatrix. Both attained the age of 21 years, and died, Mary E. Ash on the 14th of December, 1843, and Thomas F. Ash on the 12th of February, 1847. *Held*, that the intention of the testatrix was that the secondary devise should take effect, if at all, upon the termination of life at some referable, determinate period, viz: before her own decease, or under lawful age, and not indefinitely. And that, both devisees having survived the testatrix and attained the age of 21 years, each was entitled to an equal moiety of the estate devised. And that upon the death of the shortest liver, the whole estate did not go to the survivor. *ib*

WILLIAMSBURGH, (CITY OF.)

1. The powers possessed by the common council of the late city of Williamsburgh to open, regulate, grade and pave streets, &c. instead of being general, were, by the law conferring those powers, made subject to certain important restrictions and limitations. No proceedings could be taken to open, regulate, grade or pave any street or avenue, except upon petition signed by one-third of the persons owning land situated within the assessment limits. These provisions of law being public, and all the preliminary proceedings leading to the determination of the common council to make a particular improvement, being matters of public record in the office of the city clerk, all persons are chargeable with notice of the law and of such proceedings. *Swift* v. *The City of Williamsburgh*, 427

2. If, therefore, an individual enters into a contract with the corporation, for improving a street, he cannot, after having performed a portion of the work, maintain an action against the corporation to recover damages, on the ground that he was induced to enter into such contract, and to perform the work, upon the false representations of the defendants, that one-third of the owners of lands to be assessed had petitioned for the improvement, and that the corporation had taken the necessary proceedings to authorize them to make the same; whereas no such petition had in fact been presented, and the corporation had no power to cause an assessment for the expense of the improvement to be made, or to contract with the plaintiff for the performance of the work. *ib*

3. It is the duty of persons about to enter into a contract with the corporation for the performance of work in improving the streets, which is to be paid for by an assessment upon the district benefited, first to examine the records in the city clerk's office, to see whether a proper petition has been presented, and the other preliminary steps taken. *ib*

WITNESS.

See TRIAL, 1, 2.

WORK AND LABOR.

1. The sickness or death of a party contracting to perform a particular personal service, is a legal excuse for the non-performance of the work, in a case where compensation is made dependent upon full performance. *Wolfe* v. *Howes*, 174

2. In such a case the party, or his representatives, may recover upon the *quantum meruit, pro rata*, for the service actually performed. *ib*

END OF VOLUME TWENTY-FOUR.

THE LIBRARY OF THE UNIVERSITY OF CALIFORNIA LOS ANGELES

UC SOUTHERN REGIONAL LIBRARY FACILITY
A 001 166 775 5